TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 164

WILLIAM H. BURTON, APPELLANT,

vs.

WILMINGTON PARKING AUTHORITY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

FILED JUNE 22, 1960
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[fol. 1]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON, Plaintiff,

vs.

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware,

and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Defendants.

COMPLAINT—Filed August 20, 1958

1. The plaintiff is a citizen of the United States and of the State of Delaware, resident in the City of Wilmington. He is among those classified as "colored persons," of Negro blood or ancestry.

2. (a) The defendant The Wilmington Parking Authority (hereinafter referred to as "The Authority") is a public body corporate and politic, an agency of the State of Delaware, created and established by the City of Wilmington in August, 1951, pursuant to an act of the General Assembly, to serve a public purpose, use and function, namely, the erection and maintenance of a public structure or facility for off-street parking of automobiles in the City of Wilmington, Delaware.

(b) The defendant Eagle Coffee Shoppe, Inc., is a corporation of the State of Delaware and is engaged in the business of operating a restaurant or dining room for the purveyance and sale of food and drink, principally for consumption on the premises.

3. (a) The Authority has erected and operates a parking facility on a rectangular plot of land in the center of the principal business area of Wilmington occupying 178 feet along the southerly side of Ninth Street from Shipley Street to Orange Street, between which streets it extends southwardly from Ninth Street about 350 feet.

[fol. 2] (b) Land upon which this facility is operated was purchased in part by advances of public funds of the City of Wilmington.

4. The Authority by act of the General Assembly is given power to lease portions of the first floor of its public facility for commercial use, solely, however, for the purpose of assisting in defraying the expenses of maintaining and operating its facility as a single self-sustaining governmental unit.

5. The Authority has determined that to make economically feasible the fulfilment of its public purpose, namely, the operation of an off-street parking facility as a self-sustaining governmental unit, it is necessary to lease a portion of the area of the facility for commercial purposes.

6. (a) In April, 1957, The Authority entered into a contract of lease with defendant Eagle Coffee Shoppe, Inc., which lease demises to the latter for a term of twenty years at an annual rental of upwards of Twenty-eight Thousand Dollars a portion of the said facility, or building, of The Authority solely for use and occupancy as a restaurant, dining room, banquet hall, cocktail lounge and bar; and said contract gives the lessee an option to renew its lease for a further term of ten years at the same rental.

(b) The lease provides, *inter alia*, that the lessee "shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority."

7. On August 14, 1958, plaintiff, after parking his automobile in the said facility of The Authority, proceeded to the said restaurant located in the said facility where he sought to purchase service of food and drink; but solely

because of his race, color and ancestry, plaintiff was refused such service by The Authority, acting through the instrumentality of its lessee, the defendant Eagle Coffee Shoppe, Inc., and by said lessee, using and occupying a portion of said public facility, maintained and operated by The Authority as a single self-sustaining governmental unit.

8. The conduct of the defendants in refusing plaintiff service in the restaurant in said governmental facility solely on the basis of plaintiff's color, race and ancestry is in pursuance of a policy, practice, rule, regulation, and usage adopted, consented to and acquiesced in by The Authority, is oppressive, unequal and discriminatory, and is conduct of an agency of the State of Delaware depriving [fol. 3] plaintiff of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

9. Plaintiff has suffered irreparable injury and faces irreparable injury in the future by reason of the discrimination herein complained of, and has no plain, adequate or complete remedy to redress the wrong and illegal conduct of defendants herein complained of, other than by this suit for declaration of rights and an injunction.

10. This is a class action authorized by Rule 23 (a) (3) of the Rules of the Court of Chancery of the State of Delaware, in that plaintiff is a member of a class so numerous as to make it impracticable to bring all members before the court, the character of the right which plaintiff seeks to enforce is several, there are common questions of law and fact affecting the several rights, and common relief is sought. For these reasons plaintiff brings this action in his own behalf and on behalf of all members of the class without specifically naming the members thereof.

Wherefore, plaintiff respectfully prays the Honorable Court that:

1. The Court enter a judgment or decree declaring the policy, practice, rule, regulation and usage of the defendants or either of them denying, by reason of color, race

or ancestry, to the plaintiff or any other person classified as colored or Negro the right and privilege to use and enjoy to the same extent and in the same manner as other persons the appointments, facilities and services of the said restaurant a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

2. The Court issue an injunction, temporary until final hearing and thereafter permanent, restraining the defendants, their officers, agents, members, employees, lessees, and attorneys, from denying, by reason of color, race or ancestry, to the plaintiff or any person classified as colored or Negro the right to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the said restaurant.

3. The Court allow plaintiff his costs and grant such other and further relief as to the Court may appear equitable and just and as the Court may deem necessary and proper in the premises.

William H. Burton, Plaintiff.

Louis L. Redding, Attorney for Plaintiff, 923 Market Street, Wilmington, Delaware.

[fol. 4] *Duly sworn to by William H. Burton, jurat omitted in printing.*

[fol. 4a] [File endorsement omitted]

[fol. 5]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

ANSWER OF THE WILMINGTON PARKING AUTHORITY—
Filed September 10, 1958

1. Admitted.

2. (a) Admitted.

(b) Admitted.

3. (a) This defendant admits that it has caused a parking facility to be erected on the plot of land mentioned in paragraph 3 (a) of the Complaint and that it operates the major portion thereof for public parking purposes. For further answer, this defendant alleges that certain portions of said facility are leased by this defendant to certain persons, firms or corporations who carry on private businesses therein, independent of supervision or control by this defendant.

(b) Admitted.

4. It is admitted that this defendant has the power to lease portions of said facility in the manner and for the purposes provided by 22 Del. C. c. 5.

5. Admitted.

6. (a) Admitted.

[fol. 6] (b) Admitted.

7. It is denied that defendant refused plaintiff any service. It is further denied that Eagle Coffee Shoppe, Inc., is an instrumentality, agent, servant or employee of defendant. The averment, so far as it purports to allege that any act of Eagle Coffee Shoppe, Inc., is the act of defendant, is denied. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment so far as the same concerns any act of plaintiff or Eagle Coffee Shoppe, Inc.

8. Denied.

9. Denied.

10. This defendant is without knowledge or information sufficient to form a belief as to the truth of this averment.

First Separate Defense

11. This defendant is informed and therefore avers that it has no power by reason of the provisions of the aforesaid lease referred to in paragraph 6 (a) of the Complaint or any law of the United States of America or The State of Delaware whereby it can limit, enlarge, regulate or otherwise define or control the patrons of its lessees carrying on private businesses in said facility.

Second Separate Defense

12. This defendant is further informed and therefore avers that by reason of the provisions of 24 Del. C., Section 1501, the defendant, Eagle Coffee Shoppe, Inc., has the right to refuse service to any member of the public on the grounds recited in said statute.

[fol. 7] Third Separate Defense

13. The Complaint fails to state a claim upon which relief can be granted.

Wherefore, this defendant prays that the Complaint herein be dismissed as to it with costs.

Clair John Killoran, North American Building, Wilmington, Delaware, Attorney for the Defendant, The Wilmington Parking Authority.

[fol. 7a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 8]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

ANSWER OF EAGLE COFFEE SHOPPE, INC.—
Filed September 10, 1958

1. Admitted.

2. (a) Admitted.

(b) Admitted.

3. (a) Admitted that The Authority has caused a parking facility to be erected on the plot of land mentioned in paragraph 3 (a) of the Complaint and that it operates the major portion thereof for public parking purposes. For further answer, this defendant alleges that certain portions of said facility are leased by The Authority to certain persons, firms or corporations who carry on private businesses therein, independent of supervision or control by The Authority.

(b) Admitted.

4. Admitted that The Authority has the power to lease portions of said facility in the manner and for the purposes provided by 22 Del. C. c. 5. Denied that the restaurant operated by the defendant, Eagle Coffee Shoppe, Inc., is operated as a portion of a governmental unit.

5. Admitted.

[fol. 9] 6. (a) Admitted.

(b) Admitted.

7. Defendant, Eagle Coffee Shoppe, Inc., is without knowledge or information sufficient to form a belief as to the truth of such averments as relate to acts done by the plaintiff.

It is denied that plaintiff was refused service by The Authority, or that defendant, Eagle Coffee Shoppe, Inc., is

the instrumentality, agent, servant or employee of The Authority.

It is denied that the aforesaid restaurant is operated as a part of a governmental unit. For further answer this defendant says that the aforesaid restaurant is operated by it as a private business free from supervision or control by The Authority.

8. Denied.

9. Denied.

10. Defendant, Eagle Coffee Shoppe, Inc., is without knowledge or information sufficient to form a belief as to the truth of this averment.

Second Defense

The Complaint fails to state a claim upon which relief can be granted.

Third Defense

1. 24 Del. C., Section 1501 provides as follows:

"No keeper of an inn, tavern, hotel or restaurant or other place of public entertainment or refreshment of travelers, guests or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers and would injure his business."

2. The defendant, Eagle Coffee Shoppe, Inc., is the [fol. 10] keeper of a restaurant operated by it as a private business and is not obliged by law to furnish refreshment to persons whose reception or entertainment would be offensive to the major part of its customers and would injure its business

3. The defendant, Eagle Coffee Shoppe, Inc., is therefore not bound to serve the plaintiff in its restaurant.

Fourth Defense

The defendant, Eagle Coffee Shoppe, Inc., is the keeper of a restaurant operated by it as a private business and is not bound by law to conduct its business in such a manner as is demanded by the plaintiff.

Wherefore, this defendant prays that the Complaint herein be dismissed as to it with costs.

Thomas Herlihy Jr., Attorney for the Defendant, Eagle Coffee Shoppe, Inc., 320 North American Building, Wilmington, Delaware.

[fol. 10a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 11]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, EAGLE COFFEE SHOPPE, INC.—Filed December 18, 1958.

The defendant, Eagle Coffee Shoppe, Inc., a corporation of the State of Delaware, by Thomas Herlihy, Jr., its Attorney, hereby moves for summary judgment in the above entitled cause dismissing the complaint on the following grounds:

1. That said defendant, Eagle Coffee Shoppe, Inc., is the keeper of a restaurant operated by it as a private business and is not bound by law to conduct its business in such a manner as is demanded by the plaintiff in the complaint filed in this case.

2. That a statute of the State of Delaware, 24 Del. C., Section 1321 provides as follows:

"No keeper of an inn, tavern, hotel or restaurant or other place of public entertainment or refreshment of travelers

guests or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers and would injure his business."

[fol. 12] That the defendant, Eagle Coffee Shoppe, Inc., as the keeper of a restaurant operated by it as a private business is not obliged by law to furnish refreshment to the plaintiff in view of the aforesaid statute.

3. The complaint fails to state a claim upon which relief can be granted.

Thomas Herlihy Jr., Attorney for Defendant, Eagle Coffee Shoppe, Inc., 320 North American Building, Wilmington, Delaware.

[fol. 12a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 14]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

THE WILMINGTON PARKING AUTHORITY'S MOTION FOR SUMMARY JUDGMENT—Filed January 5, 1959

Now Comes the defendant The Wilmington Parking Authority, by its attorney, Clair John Killoran, and moves the Court to grant summary judgment in favor of it and against the plaintiff, showing that there is no genuine issue as to any material fact and that it is entitled to such judgment upon the following grounds:

(1) The defendant Eagle Coffee Shoppe, Inc., carries on a private business in that portion of the facility leased to it, independent of any supervision or control by this defendant, and the Fourteenth Amendment to the United States Constitution is inapplicable to such business.

(2) The defendant Eagle Coffee Shoppe, Inc. is not an instrumentality, agent, servant or employee of this defendant.

(3) This defendant has no power by reason of its lease with the defendant Eagle Coffee Shoppe, Inc. or any law of the United States or the State of Delaware whereby it can limit, enlarge, regulate or otherwise define or control the patrons and policies of the said defendant.

[fol. 15] (4) By reason of the provisions of 24 Del. C. Sec. 1501 the defendant Eagle Coffee Shoppe, Inc. has the right to refuse service to any member of the public on the grounds recited in said statute.

Clair John Killoran, Bank of Delaware Building, Wilmington, Delaware, Attorney for Defendant, The Wilmington Parking Authority

[fol. 16a] [File endorsement omitted]

[fol. 17]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

AFFIDAVIT OF JAY C. POWNALL—Filed January 16, 1959

State of Delaware,
New Castle County, ss.

Be It Remembered that on this 14th day of January, 1959, personally came before me, the subscriber, a Notary Public for the County and State aforesaid, Jay C. Pownall, personally known to me to be such, who being by me first duly sworn, deposes and says as follows:

I am Chairman of The Wilmington Parking Authority, a body corporate and politic, created and existing pursuant to 22 Del. C. c. 5, as amended, and exercising powers of the State of Delaware as an agency thereof, and one of the defendants in the above entitled action. As Chairman,

I am authorized to make this affidavit in the behalf of the Authority. In such capacity, I am acquainted with the history, purposes, policies and administration of the Authority, and, in particular, I am acquainted with the Authority's present administration of the off-street parking facility on Ninth Street between Shipley and Orange Streets in Wilmington, Delaware.

[fol. 18] While the Authority enjoys power of condemnation pursuant to its enabling legislation, the land site of the Ninth Street facility was secured through negotiated purchases from the former private owners of the various parcels comprising the site. The parcel purchased from Diamond Ice & Coal Co. was paid for partly in Revenue Bonds of the Authority and partly in cash donated by the City of Wilmington, pursuant to 22 Del. C. c. 5 aforesaid. The other parcels comprising the facility site were paid for in cash borrowed by the Authority from Equitable Security Trust Company.

Subsequently, the City of Wilmington gave the Authority $1,822,827.69 which sum the Authority applied to the redemption of the Revenue Bonds delivered to Diamond Ice & Coal Co. and to the repayment of the Equitable Security Trust Company loan.

Upon expert consultation and advice, the Authority determined that the construction of the Ninth Street facility could not be financed by revenue from parking only and the proceeds of the sale of revenue bonds. The Authority was advised that bonds payable out of parking revenues only would not be saleable in the existing market. Long-term leases to responsible tenants of portions of the facility were necessary to provide additional revenue to meet debt service requirements and to make bond financing feasible. Accordingly, the public was invited to bid for rental spaces for private businesses in the facility. Among the private leases made was that of the defendant Eagle Coffee Shoppe, Inc. A copy of the Eagle lease is attached as Exhibit "A". The Ninth Street facility was finally constructed solely from the proceeds received from the sale of revenue bonds [fol. 19] issued and delivered on the sole credit of the Authority. The State of Delaware and the City of Wilmington

are not liable to any extent for the payment of the principal of and interest on said bonds.

As appears from the lease, the Eagle furnished substantially all of the finishings in the portion of the facility leased to it besides the fixtures and equipment incidental to its business. It is stipulated that the Eagle shall use the premises for a restaurant, dining room, banquet hall, cocktail lounge and bar and for no other use.

The Authority reserves no power under the lease to control or suggest the patronage policies of the Eagle. More particularly, the Authority has never instructed or advised or in any manner suggested to the Eagle any policy of admission or exclusion of the latter's patrons or any matter touching upon its patronage.

As stated above, the Authority has no legal power over the actions of the Eagle other than as expressed in the said lease, nor has the Authority ever exercised any de facto control over the Eagle's management or patronage policies. More particularly, the Authority did not direct, authorize or ratify the action of the Eagle alleged in the complaint in the above action relative to the plaintiff.

Jay C. Pownall

Sworn to and Subscribed before me the day and year first above written.

Zadoc A. Pool, Notary Public.

(Seal)

[fol. 20]

EXHIBIT "A" TO AFFIDAVIT OF JAY C. POWNALL

FORM OF LEASE

THIS AGREEMENT, made this 8th day of April, 1957, by and between THE WILMINGTON PARKING AUTHORITY, a public body corporate and politic, created by and exercising public powers of the State of Delaware as an agency thereof pursuant to the provisions of Chapter 5, Title 22, Delaware Code of 1953, as amended, hereinafter

called the Lessor, party of the first part, AND EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, hereinafter called the Lessee, party of the second part,

WITNESSETH:

For and in consideration of the mutual covenants and agreements hereinafter contained, the Parties hereto covenant and agree as follows:

(1) Lessor covenants and agrees that it will complete the construction of the building of which the leased premises form a part, as expeditiously as possible, which building shall be located on the property of the Lessor in the City of Wilmington, Delaware, on the Southerly side of Ninth Street extending from Shipley Street to Orange Street. That portion of the building hereinafter leased to the Lessee, and referred to as the leased premises, shall be finished by the Lessor substantially in accordance with the provisions of numbered paragraph 3 hereof.

(2) Lessor hereby demises and leases to Lessee on the terms and conditions herein contained that portion of the said building designated and delineated on Exhibit "A" attached hereto and made a part hereof. Said Lease shall begin upon the date when the leased premises are ready for occupancy, i.e., installation of fixtures by the Lessee, and shall continue until the expiration of twenty (20) years after the said date of the beginning of the term of this [fol. 21] Lease, or until the expiration of any renewal or renewals of said term pursuant to the option provided in paragraph (17).

(3)* Lessor will complete the decorative finishing of the leased premises and utilities therefor, without cost to Lessee, to the extent following:

(a) FLOORS—Vinyl asbestos tile on ground floor and mezzanine only. Ceramic tile floors in basement toilet (s). Concrete floors elsewhere.

* This paragraph to be phrased in final lease to conform with type of bid.

(b) WALLS—White plaster walls, with four inch (4") rubber base; ground floor and mezzanine. Tile wainscot and plaster walls in basement toilet (s). Concrete block and concrete walls in basement (s).

(c) CEILINGS—Hung acoustical tile in ground floor and mezzanine areas. Plaster in basement toilet (s). Concrete in other areas.

(d) STAIRS—Connecting different levels of each unit, such stairs not to exceed three feet (3') in width with wrought iron handrail.

(e) RAILINGS—Wrought iron railing along front of mezzanine and along upper level of basement.

(f) SHOW WINDOW FLOORS—Wood flooring two feet six inches (2'6") along Ninth Street and one foot two inches (1'2") along Shipley Street and Orange Street.

(g) ELECTRICITY—Panelboard will be furnished in basement of each unit. (Each unit will be separately metered and electricity for each unit will be payable by Lessee. All conduits, outlets, light fixtures and lamps must be installed by Lessee at Lessee's cost and expense.)

(h) HEATING—Plugged tees at ceiling of basement of each unit. (Heat will be furnished by Lessor without additional cost to Lessee, however, Lessee must install Lessee's own separate heat distribution system within the unit(s) leased.)

(i) AIR CONDITIONING—A capped two inch (2") drainage outlet for Air Conditioning will be provided for each unit. (The installation of the air conditioning system for each unit must be done by Lessee at Lessee's expense and Lessee shall be responsible for the costs of its operation and maintenance.)

(j) TOILET—Will be installed by Lessor as well as toilet exhausts in each unit. (The operating cost both for electricity and maintenance shall be paid by Lessee.)

[fol. 22] (k) WATER—Lessor will provide a three quarter inch (3/4") metered cold water line for each unit, terminating in rear of basement of each unit, with a one half inch (1/2") cold water extension to the area of Air Conditioning equipment. (Lessee shall at Lessee's cost and expense provide equipment to heat water for each unit and also shall pay for water consumed and a proportional sewer charge directly to the Water Department of the City of Wilmington.)

(l) DRAINAGE—Lessor will provide required drainage for toilet rooms and air conditioning equipment. (Any special drainage required by Lessee shall be installed by Lessee at Lessee's cost and expense.)

(m) GAS—Lessor will provide gas service in the boiler room. (Any individual unit service must be arranged by Lessee with the Delaware Power & Light Company at Lessee's cost and expense.)

(n)* UNIFORM LEVEL—Lessor will construct the ground floor level of stores No. 3 and No. 4 to the same ground floor level as store No. 3 as now established by the contract documents between the Lessor and its general contractor, McCloskey & Co.

[Marginal handwritten notation—J.A. 4/3/57]

The responsibility of the Lessor to complete decorative finishing and utilities is expressly limited as above set forth and all additional finishing and/or utility services desired by Lessee shall be done and provided by Lessee at Lessee's sole cost and expense, subject, however, to the provisions of Exhibit "B" attached and made a part hereof.

[Marginal handwritten notation—J.A. 4/3/57]

(4) Lessee covenants and agrees to pay to Lessor an annual rent of TWENTY-EIGHT THOUSAND SEVEN HUNDRED Dollars ($28,700.00) for and during the term of this Lease, payable monthly in advance on or before

* To be utilized if Lessor is to construct a combination of units on a uniform level.

the first day of each month in equal monthly installments of TWENTY-THREE HUNDRED NINETY-ONE & 67/100 Dollars ($2,391.67), except that the rent or rents for any renewal or renewals of said term shall be as provided in paragraph (17). In the event this Lease begins, as provided in paragraph (2), on a day other than the first day of the month of such beginning, the rent installment payable for such month shall be reduced pro rata according to the date of such day of beginning.

[fol. 23] (5) Lessee, upon performance of the covenants, agreements and conditions on its part provided herein, shall peaceably have, hold and enjoy the premises herein leased for the said term and any renewal or renewals thereof.

(6) Prior to occupancy of the leased premises by Lessee, all notices herein required to be given by Lessor to Lessee shall be sufficiently given when the same are mailed in writing to Lessee's principal office. All notices herein required to be given by Lessor to Lessee, subsequent to occupancy of the leased premises by Lessee, shall be sufficiently given when the same are left in writing upon the leased premises. All notices herein required to be given by Lessee to Lessor shall be in writing and sent by registered mail, addressed to Lessor's office in Wilmington, Delaware. The sole evidence of such notice by Lessee to Lessor for the purpose of ascertaining compliance with the terms and conditions of this Lease shall be a Registry Return Receipt signed by a member or agent of Lessor.

(7) Lessor shall, for and during the term of this Lease and any renewals thereof, make or cause to be made, at its own cost and expense, all necessary structural repairs to the leased premises; all repairs to the exterior surfaces, if any, of the leased premises, excluding store fronts; and all necessary repairs to the adjacent pavements; provided such repairs are not occasioned by the act or neglect of Lessee or its servants, agents or employees. Lessee shall make or cause to be made, at Lessee's own cost and expense, all repairs to said building and pavements made necessary by Lessee's own act or neglect.

(8) Lessor reserves the right to place, erect or construct, or cause to be placed, erected or constructed, suspended directional signs on the exterior of the leased premises, provided, however, no such directional sign shall interfere with or obscure any display sign or signs of Lessee:

(9) It is further agreed that, if during the term of this Lease or any renewal or renewals thereof the leased prem- [fol. 24] ises shall be destroyed, damaged or injured by fire, the elements, acts of God, structural defects or unavoidable casualties, or from any cause beyond the control of Lessee so as to be unfit for occupancy or the conduct of the business of Lessee, or if said premises are condemned, declared unsafe, directed repaired or rebuilt by a duly constituted governmental body, this Lease shall cease and determine at the option of Lessee and Lessee shall not be liable to pay rent from and after the time Lessee shall have surrendered possession of the leased premises to Lessor; provided, however, that if the injury or damage to, or the condition of the leased premises is such that Lessor can and does restore the premises, make the necessary repairs or comply with governmental order within ninety (90) days after the happening of such event, this Lease shall not be terminated, but the rent shall abate for that portion of the leased premises considered by Lessee untenantable or unsuitable for the conduct of Lessee's business while such condition exists and any rents paid in advance and abated hereunder shall be refunded by Lessor to Lessee. Any and all repairs, restoring and/or compliance with governmental order as provided in this paragraph shall be made by Lessor at its own cost and expense.

(10) Lessee covenants and agrees that Lessee shall, without demand:

(a) Pay the rents on the days and at the times and places that the same are payable; and if Lessor at any time or times accepts said rents after the same shall have become due and payable, such acceptance shall not excuse delay upon subsequent occasions, nor constitute or be construed as a waiver of any of Lessor's rights.

(b) Pay the cost of all repairs to the leased premises, except as provided in paragraph (7).

(c) Pay the costs of all maintenance, cleaning, electricity, water, gas, and air conditioning of the leased premises.

(d) Pay the costs of all replacements of all finishings and of all worn parts of equipment in the leased premises and any sign or signs of Lessee on the exterior of the leased premises.

(e) Pay the costs of all types of insurance on the portion of the building leased hereunder, which Lessee [fol. 25] desires, or which may be required by the terms of the Trust Indenture under which any revenue bonds of Lessor are issued, except fire and other casualty insurance which shall be placed by and paid for by Lessor. In addition, without expense to Lessor, Lessee shall protect Lessor "as its interests may appear" in any insurance placed by Lessee which in any respect is applicable to the leased premises. Lessee further agrees that should any insurance policies and/or certificates thereof tendered by it under this sub-paragraph be not acceptable to Lessor, Lessee shall cause such insurance policies and/or certificates to be made acceptable by the existing insurance carrier, or in lieu thereof, place such insurance with carriers whose policies and/or certificates are acceptable to Lessor.

(f) Remove all ice and snow from the pavements adjacent to the leased premises as well as from all entrances thereto and exits therefrom, and, further, shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority.

(g) Include sub-paragraph 10(f) in any sub-lease permitted hereunder.

(11) Lessee covenants and agrees that it shall do none of the following things without the consent and/or approval in writing of Lessor first had and obtained:

(a) Assign, mortgage or pledge this Lease or underlet or sublet or sub-lease the leased premises or any part thereof, or permit any other person, firm or corporation to occupy the leased premises or any part thereof; nor shall any assignee or sub-lessee without an additional written consent from Lessor assign, mortgage or pledge this Lease or such sub-lease, and without such consent no such assignment, mortgage or pledge shall be valid; provided, however, that Lessee may sub-lease without further approval than is contained herein any or all of the area leased hereunder to the following classes of tenants: Retailing of bakery goods, ..., ... * No assignment or sub-lease, if consented to in the manner aforesaid, shall in any manner relieve or release Lessee from the liability for the performance of any of the covenants of this Lease, and the responsibility and liability of Lessee hereunder shall continue in full force and effect until the expiration of the term hereby created and any renewals thereof. Any sub-leasing of departments in any store to be operated by Lessee or by any accepted sub-lessee in the leased premises or any sub-leasing of concessions therein shall not require the written consent of Lessor so to do.

(b) Use or permit to be used any part of the leased premises during the term hereof, or any renewal, for public parking.

[fol. 26] (c) Use the toilet rooms, water closets, and other water apparatus in the leased premises for any purposes other than those for which they were constructed, nor throw sweepings, rubbish, rags, ashes, chemicals, or other injurious substances therein.

(d) Use or operate any machinery which in Lessor's sole opinion is harmful to the building or disturbing to other tenants of the building.

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* Bidder will here insert the types of tenants to which it desires to make subleases without prior consent of Lessor.

(e) Place any weights in any portion of the leased premises which in Lessor's sole opinion are beyond the safe carrying capacity of the structure.

(f) Place, erect, or construct, or cause to be placed, erected or constructed, any sign or signs upon the exterior surfaces or surfaces of the leased premises. Lessor, however, covenants and agrees that it will not unreasonably withhold its approval of any sign or signs that Lessee desires to place, erect or construct upon the said surfaces of the leased premises. Nothing contained in this sub-paragraph shall be construed as limiting or affecting the right of Lessee to place temporary advertising upon glazed surfaces.

(g)* The Lessee will use and occupy the demised premises for the purpose of a restaurant, dining room, banquet hall, cocktail lounge and bar and for no other use and purpose.

(12) It is further agreed that Lessee during the term of this Lease of any renewal thereof, shall have the privilege from time to time of making such changes, alterations or improvements to the interior of the leased premises as it may deem proper for the purpose of its business; provided, however, no changes or alterations shall be made to the leased premises of a structural nature, except interior non-support curtain walls, without the plans and specifications of any such changes or alterations being first submitted to and approved and consented to in writing by Lessor. Any changes, alterations or improvements permitted hereunder, whether with or without the consent and approval of Lessor shall be made at the sole cost and expense of Lessee. It is expressly understood and agreed that Lessee in making any such changes, alterations or improvements shall in no manner and to no extent involve or place liability on Lessor, and in the event changes or [fol. 27] alterations or improvements to the interior of the leased premises are proposed by Lessee which require the

* Bidder will insert here a covenant not to use the leased premises except for a designated purpose or purposes.

consent and approval of Lessor, Lessor reserves the right to require of Lessee a bond or other indemnity as Lessor may deem necessary and proper for its protection and the protection of its property, and Lessee shall furnish any such bond or other indemnity before the commencement of any such changes, alterations or improvements. Upon the termination of this Lease or earlier removal by the Lessee all permanent changes, alterations, additions or improvements and which become a part of the building on the leased premises shall become the property of the Lessor without liability on its part to reimburse the Lessee for the same. Any temporary partitions, fixtures (including lighting fixtures) and all machinery and equipment, shelves, counters and other trade fixtures placed in the leased premises by the Lessee which do not actually become a part of the building on the leased premises may be removed by the Lessee therefrom, provided that the Lessee shall be responsible and pay for any repairs to said leased premises which shall be necessitated by reason of the removal by the Lessee of any such personal property.

(13) Except as otherwise herein specifically provided, it is further agreed that Lessor shall not be liable and Lessee hereby waives all claims for damages of any nature which may be sustained by Lessee resulting from any accidents in or about the building of which the leased premises are a part, resulting directly or indirectly from any act or neglect of any other lessee or occupant of the building of which the leased premises are a part, or of any other person, or resulting from any act of God, fire, the elements, strikes, riots, wars, or resulting from any cause beyond Lessor's control.

(14) It is further agreed that if Lessee during the term of this Lease or any renewal thereof:

(a) Does not pay in full any and all rents and payments herein agreed to be paid by Lessee within thirty (30) days after the same shall be due and payable; or

(b) Violates or fails to perform, or otherwise breaches any of the terms, conditions or covenants as set forth in sub-paragraphs (b), (c), (d) and (e) of

paragraph (10) hereof, and/or as set forth in subparagraphs (b), (c), (d), (e), (f) and (g) of paragraph (11) hereof, and any such violation or default is not made good by Lessee within thirty (30) days after written notice by Lessor to Lessee; or

[fol. 28]

(c) Violates or fails to perform or otherwise breaches any of the other terms, conditions or covenants contained in this Lease; or

(d) Vacates the leased premises without having first paid and satisfied Lessor in full for all rents and payments then due, or that may thereafter become due until the expiration of the then current term; or

(e) Is adjudicated a bankrupt, or makes an assignment for the benefit of creditors, or if a Court of competent jurisdiction, whether under proceedings instituted by Lessee or otherwise assumes jurisdiction of the assets of Lessee under any provision of the Bankruptcy Act as the same now is or hereafter may be amended, or if a receiver is appointed for Lessee, or if the personal property of Lessee in the leased premises shall be levied upon by any sheriff, marshal or constable,

Then, and in any of said events, at the sole option of Lessor:

(a) The whole balance of rent and payments and all costs to Lessor shall be taken to be due and payable and in arrears as if by the terms of this Lease said balance of rent and payments were on that date payable in advance; and

(b) This Lease and the term hereby created, or any renewal thereof, shall, at the sole option of Lessor, and without waiver of any other rights of Lessor contained herein, terminate and become absolutely void without any right on the part of Lessee to waive the forfeiture by the payment of any sum due or by the performance of any condition, term or covenant broken; and

(c) Lessor may enter the premises and without demand proceed by distress and sale of the goods there to be found to levy the rent and other payments and charges payable hereunder as rent and all costs and officers' commissions including watchmen's wages and constables' commissions, and in such case all costs, officers' commissions and other charges shall immediately attach to and become a part of the claim of Lessor for rent and payments, and any tender of rent and payments without said costs, commissions and charges made after the issue of the warrant of distress shall not be sufficient to satisfy the claim of Lessor; and

(d) If this Lease or any part thereof is assigned or if the premises or any part thereof are sublet, Lessee hereby irrevocably constitutes and appoints Lessor as Lessee's agent to collect the rents due from such assignee or sub-lessee and apply the same to the rent and payments due hereunder without in any way affecting Lessee's obligation to pay any unpaid balance of rent or payments due hereunder; and

(e) Lessor may lease said premises or any part or parts thereof to such persons, firms or corporations as [fol. 29] may in Lessor's discretion seem best, and Lessee shall be liable for any loss of rent or payments and other charges payable hereunder by Lessee for the balance of the then current term; and

(f) If the rent and payments shall remain unpaid on any day when the same ought to be paid, Lessee hereby empowers any prothonotary or attorney of any court of record to appear for Lessee in any and all citations which may be brought for said arrears of rent and payments, and to sign for Lessee an agreement for entering in any competent court an amicable action or actions to confess judgment against Lessee for all arrears of rents and payments, and for interest and costs together with an attorney's fee of five per cent (5%). Such authority shall not be exhausted by any one exercise thereof, but judgment may be con-

fessed as aforesaid from time to time as often as any of said rent and payments shall fall due or be in arrears; and

(g) Lessee hereby releases and discharges Lessor from all claims, actions, suits and penalties for or by reason of or on account of any entry, ejectment, confession of judgment, distraint, levy or sale, or the loss of goods and chattels left on the premises.

(h) All of the remedies hereinbefore given to Lessor and all rights and remedies given to Lessor by law and equity shall be at Lessor's option cumulative and concurrent. No determination of this Lease, or the taking or recovering of the leased premises shall deprive Lessor of any of its remedies or actions against Lessee for rent and payments due at the time, or which, under the terms hereof, would in the future become due and payable as if there had been no determination, nor shall the bringing of any action for rent or payments or breach of covenant, or the resort to any other remedy herein provided for the recovery of rent and payments be construed as a waiver of the right in Lessor to obtain possession of the leased premises,

(15) It is hereby covenanted and agreed, any law, usage or custom to the contrary notwithstanding, that Lessor shall have the right at all times to enforce the covenants and provisions of this Lease in strict accordance with the terms hereof, notwithstanding any conduct on the part of Lessor in refraining from so doing at any time or times; and further, that the failure of Lessor at any time or times to enforce its rights under said covenants and provisions strictly in accordance with the same shall not be construed as having a custom in any way or manner contrary to the specific terms, conditions, and covenants of this Lease, or as having in any manner modified the same.

[fol. 30] (16) In the event any real estate tax shall at any future time be payable on the leased premises, such tax shall be payable by Lessor.

(17) Lessee shall have the option to renew this Lease upon the ~~following terms and conditions~~:* same terms and conditions for a further term of ten (10) years, provided it satisfies the Lessor, in writing, any time during the existence of the first period of this Lease, but not later than six (6) months prior to the termination date of the first term of this Lease.

For and during such renewal term or terms provided in this paragraph, Lessee covenants and agrees to pay to Lessor an annual rental of TWENTY-EIGHT THOUSAND SEVEN HUNDRED Dollars ($28,700.00). Said rent shall be payable in advance on the first day of each month in equal monthly installments of TWENTY-THREE HUNDRED NINETY-ONE AND 67/100 Dollars ($2391.67). It is further provided that if said renewal [fol. 31] terms shall begin on a day other than the first day of the month of such beginning, the rent installment payable for such month shall be reduced pro rata according to the date of such day of beginning. During such renewal terms or any of them, Lessor shall be under no obligation to renew or replace finishings. Where necessary, such replacements and renewals shall be made by Lessee at its own cost and expense.

IN WITNESS WHEREOF, The Wilmington Parking Authority has caused this Lease to be executed by its Chairman and its corporate seal to be hereunto affixed and attested by its Secretary, and EAGLE COFFEE SHOPPE, INC. has caused this Lease to be executed by its President and the corporate seal to be hereunto affixed and attested by its Secretary, all on the day and year first aforesaid.

THE WILMINGTON PARKING AUTHORITY

By /s/ WILLIAM FEINBERG
Chairman

* Option clause to be inserted if applicable and contained in bid.

Signed, sealed and delivered in the presence of:

/s/ BARNEY CANTOR

(SEAL)

Attest /s/ HUBERT S. STEER
Secretary

EAGLE COFFEE SHOPPE, INC.

By /s/ JAMES ASSIMOSS
President

/s/ ELIZABETH LAFFERTY

(SEAL)

Attest /s/ ANDREW ASSIMOSS
Secretary

[fol. 32]

EXHIBIT "A" TO LEASE

The Lessee is hereby authorized to make or cause to be made changes in and/or additions to the construction of the leased premises as described in the said Contract Documents between the Lessor and McCloskey & Co., and whether such changes and/or additions are structural or otherwise, as may be required by the Lessee and approved by the Lessor's Architect, provided all such changes and/or additions shall be made at the sole cost and expense of the Lessee, due credit, however, to be allowed Lessee by Lessor for any work mentioned in paragraph numbered 3 of this lease and/or in said Contract Documents applicable to the leased premises, which is not performed by the Lessor. The Lessor agrees to pay any credit due the Lessee as aforesaid as shall be certified by said McCloskey & Co., and approved by the Consulting Engineer and Architect of the Lessor, said payments to be made upon the Lessee completing any such changes and/or additions to be made by Lessee.

[Handwritten marginal notation—J.A. 4/3/57]

[fol. 32a] [File endorsement omitted]

[fol. 34]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

MOTION TO AMEND ANSWER OF EAGLE COFFEE SHOPPE, INC. TO SUBSTITUTE PARAGRAPH 7 OF THE FIRST DEFENSE—Filed February 9, 1959

Comes Now the defendant, Eagle Coffee Shoppe, Inc., in the above entitled cause, by its Attorney, and moves this Honorable Court, for leave to amend its answer by striking out paragraph 7 of the first defense and substituting in lieu thereof the following:

7. The defendant admits the refusal to serve the plaintiff because of his race, color and ancestry.

It is denied that the aforesaid restaurant is operated as a part of a governmental unit. For further answer this defendant says that the aforesaid restaurant is operated by it as a private business free from supervision or control by The Authority.

Thomas Herlihy Jr., Attorney for the Defendant, Eagle Coffee Shoppe, Inc., 320 North American Building, Wilmington, Delaware.

[fol. 35]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

ORDER GRANTING MOTION TO AMEND ANSWER OF EAGLE COFFEE SHOPPE, INC.—February 9, 1959

Upon consideration of motion filed in this cause by counsel for defendant, Eagle Coffee Shoppe, Inc., herein, it is this 9th day of February, A.D. 1959,

Ordered, that the said defendant, Eagle Coffee Shoppe, Inc., be granted leave to amend its answer filed herein by striking out paragraph 7 of the first defense and substituting in lieu thereof the following:

"7. The defendant admits the refusal to serve the plaintiff because of his race, color and ancestry.

It is denied that the aforesaid restaurant is operated as a part of a governmental unit. For further answer this defendant says that the aforesaid restaurant is operated by it as a private business free from supervision or control by The Authority."

William Marvel, Vice Chancellor.

[Handwritten notation]

The plaintiff consents to the amendment sought.

Louis L. Redding, Attorney for Plaintiff.

[fol. 35a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 36]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

AFFIDAVIT OF ROBERT W. ANDREWS—Filed February 16, 1959

State of Delware,
New Castle County, ss.

Be It Remembered that on this 13th day of February, 1959, personally came before me, the subscriber, a Notary Public for the State of Delaware, Robert W. Andrews, who, after being by me duly sworn according to law, did depose and say as follows:

"As a member of a voluntary citizens' organization, known as the Committee for Fair Practices, I am personally aware that there are many restaurants and eating places in Wilmington, Delaware, and in northern New Castle County, Delaware, including the eating establishments named in the attached list, titled "Schedul A," which practice and follow the policy of serving all persons without any distinction on account of race or color."

Robert W. Andrews

Sworn to and Subscribed before me the day and year aforesaid.

Rose G. Bernardo, Notary Public.

(Seal)

[fol. 37]

SCHEDULE A TO AFFIDAVIT

EATING ESTABLISHMENTS WHICH SERVE EVERYONE

Compiled by

COMMITTEE FOR FAIR PRACTICES

Airport Restaurant
New Castle, Delaware

Bus Center
Second and French Streets

Cafeteria
DuPont Highway

Chuck Wagon
Kirkwood Highway

College Inn
Newark, Delaware

Eckerd's Suburban Stores
DuPont Highway,
Wilmington Manor
2003 Concord Pike,
Fairfax
Merchandise Mart

Expresso Coffee Shop
1003 Tatnall Street

Gamiel Bros. Delicatessen & Restaurant
13 E. 7th Street

Gin's Coffee Shop
601 N. Lincoln Street

H. L. Green Co., Inc., 5 & 10
610 Market Street

Greenhill Restaurants
2nd & Greenhill Avenue
4001 Market Street
Newport Gap Pike
3 E. 4th Street

Gus' Luncheon
6th and Lincoln Streets

Hearn's Restaurant
2008 Market Street

Holiday Inn
1843 Marsh Road

Hotel DuPont
11th and Market Streets

Hotel Rodney
12th and Market Streets

Howard Johnson's Restaurants
DuPont Highway &
Hare's Corner
4919 Gov. Printz Highway
Concord Pike &
Murphy Road
Dover, Delaware

Hoy's 5 & 10
206 N. Union Street

Hunter's Restaurant
Delaware Trust Building

Kennard's (Basement Lunch Counter)
617 Market Street

S. S. Kresge Stores
611 Market Street
8th and Market Streets

Loump's Diner
3414 Kirkwood Highway

M.&M. Diner
DuPont Highway

Naaman's Teahouse
Philadelphia Pike

Pennsylvania Railroad Station
Front and French Streets

Picciotti's
4th and DuPont Streets

Post Houses
43rd & Market Streets
105 N. Union Street
Newark, Delaware

Powder Mill Restaurants
Kennett Pike

Reynolds Candy Company
703 Market Street

Smith & Strevig Drug Store
Delaware Avenue &
Adams Street

Strawbridge & Clothier
Gov. Printz Blvd. &
Edgemoor Rd.

Sun Ray Drug Stores
208 W. 10th Street
Merchandise Mart

Three Little Bakers
1313 Lancaster Avenue

Taddle House
702 Delaware Avenue

Tourinns, Inc.
DuPont Highway

United Cigar Store
927 Market Street

Wanamaker's
18th & Augustine Cut-off

Whalen's Drug Store
8th and Market Street

Wilmington Dry Goods
4th and Market Streets

F. W. Woolworth Stores
504 Market Street
9th and Market Streets
Merchandise Mart

"Y" Coffee Shop
Walnut Street Branch
10th and Walnut Street

Y.M.C.A. Dining Room
11th and Washington Streets

Y.W.C.A. Coffee Shop
10th and King Streets

[fol. 37a] [File endorsement omitted].

Acknowledgment of Service (omitted in printing).

[fol. 38]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

AFFIDAVIT OF EARL C. JACKSON—Filed February 16, 1959

State of Delaware,
New Castle County, ss.

Be It Remembered that on this 13th day of February, 1959, personally came before me, the subscriber, a Notary Public for the State of Delaware, Earl C. Jackson, who, after being by me duly sworn according to law, did depose and say as follows:

"As a member of a voluntary citizens organization, known as the Committee for Fair Practices, between March 11 and March 28, 1957, with two other members of the organization, I visited, pursuant to a previous ap-

pointment, William Feinberg, then chairman of The Wilmington Parking Authority. At this visit, we discussed with Mr. Feinberg the policy of The Wilmington Parking Authority with respect to non-discriminatory use of the restaurant to be located on the premises of Wilmington Parking Authority at Ninth and Orange Streets, Wilmington, Delaware. We pointed out to Mr. Feinberg our interest in having a policy of non-discrimination observed in this restaurant. At that time, Mr. Feinberg told us that, in view of the fact that the contract of the Parking Authority with Eagle Restaurant had already been signed, it was too late to require that the restaurant serve everyone irrespective of race.

Further, that as a member of said Committee for Fair [fol. 39] Practices, I have been engaged with other members of this organization, in making a canvass and survey of restaurants and other eating places in the City of Wilmington, Delaware, and adjacent northern New Castle County, Delaware, and as a result of my said activity, I am personally aware that the eating places named in the attached list, titled "Schedule A," practice and follow a policy of serving all patrons without discrimination because of race or color."

Earl C. Jackson

Sworn to and Subscribed before me the day and year aforesaid.

Joseph A. Morris, Notary Public.

(Seal)

[fol. 40]

SCHEDULE A TO AFFIDAVIT

EATING ESTABLISHMENTS WHICH SERVE EVERYONE

Compiled by

COMMITTEE FOR FAIR PRACTICES

Airport Restaurant
New Castle, Delaware

Bus Center
Second and French Streets

Cafeteria
DuPont Highway

Chuck Wagon
Kirkwood Highway

College Inn
Newark, Delaware

Eckerd's Suburban Stores
DuPont Highway, Wilmington Manor
2003 Concord Pike, Fairfax
Merchandise Mart

Expresso Coffee Shop
1003 Tataall Street

Gamiel Bros. Delicatessen & Restaurant
13 E. 7th Street

Gin's Coffee Shop
601 N. Lincoln Street

H. L. Green Co., Inc., 5 & 10
610 Market Street

Greenhill Restaurants
2nd & Greenhill Avenue
4001 Market Street
Newport Gap Pike
3 E. 4th Street

Gus' Luncheon
6th and Lincoln Streets

Hearn's Restaurant
2008 Market Street

Holiday Inn
1843 Marsh Road

Hotel DuPont
11th and Market Streets

Hotel Rodney
12th and Market Streets

Howard Johnson's Restaurants
DuPont Highway & Hare's Corner
4919 Gov. Printz Highway
Concord Pike & Murphy Road
Dover, Delaware

Hoy's 5 & 10
206 N. Union Street

Hunter's Restaurant
Delaware Trust Building

Kennard's (Basement Lunch Counter)
617 Market Street

S. S. Kresge Stores
611 Market Street
8th and Market Streets

Loump's Diner
3414 Kirkwood Highway

M.&M. Diner
DuPont Highway

Naaman's Teahouse
Philadelphia Pike

Pennsylvania Railroad Station
Front and French Streets

Picciotti's
4th and DuPont Streets

Post Houses
43rd & Market Streets
105 N. Union Street
Newark, Delaware

Powder Mill Restaurants
Kennett Pike

Reynolds Candy Company
703 Market Street

Smith & Strevig Drug Store
Delaware Avenue &
Adams Street

Strawbridge & Clothier
Gov. Printz Blvd. &
Edgemoor Rd.

Sun Ray Drug Stores
208 W. 10th Street
Merchandise Mart

Three Little Bakers
1313 Lancaster Avenue

Toddle House
702 Delaware Avenue

Tourinns, Inc.
DuPont Highway

United Cigar Store
927 Market Street

Wanamaker's
18th & Augustine Cut-off

Whalen's Drug Store
8th and Market Street

Wilmington Dry Goods
4th and Market Streets

F. W. Woolworth Stores
504 Market Street
9th and Market Streets
Merchandise Mart

"Y" Coffee Shop
Walnut Street Branch
10th and Walnut Street

Y.M.C.A. Dining Room
11th and Washington Streets

Y.W.C.A. Coffee Shop
10th and King Streets

[fol. 40a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 41]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

[Title omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT--
Filed April 13, 1959

The plaintiff moves for summary judgment on the ground that all the pleadings and the admissions and affidavits on file show that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

Louis L. Redding, Attorney for Plaintiff, 923 Market Street, Wilmington, Delaware.

[fol. 41a] [File endorsement omitted]

[fol. 43]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON, Plaintiff,

v.

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware,

and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Defendants.

Louis L. Redding of Wilmington for plaintiff.

Clair John Killoran and David Snellenburg, II of Wilmington for defendant, The Wilmington Parking Authority.

Thomas Herlihy, Jr., of Wilmington for defendant, Eagle Coffee Shoppe, Inc.

OPINION—April 15, 1959

MARVEL, Vice Chancellor: Plaintiff, admittedly a person within the jurisdiction of the State of Delaware and a citizen, brings this class action for a declaratory judgment in the form of injunctive relief against the action of the defendant, Eagle Coffee Shoppe Inc., a purveyor of foodstuffs and beverages, in refusing to serve him at its restaurant. [fol. 44] It is admitted that plaintiff was refused service at such restaurant solely because he is a Negro, and all parties have moved for summary judgment on the basis that there is no material fact in dispute.

The Wilmington Parking Authority, which owns the space in which the Eagle Coffee Shoppe is located, is alleged to be an agency of the State and to have acquiesced in and consented to a discriminatory practice of the restaurant violative of the Fourteenth Amendment to the Constitution of the United States and is therefore joined as a defendant to this class action.

There is no doubt but that the Fourteenth Amendment forbids any state action which denies to any person within its jurisdiction the equal protection of the laws. However, the Parking Authority, while clearly a State agency, disclaims any control over the policies of its tenant, the restaurant. It contends that it has not purported to dictate to the restaurant as to how its business should be run and that the lease granted the Eagle Coffee Shoppe is a strictly business transaction between landlord and tenant, consummated as a corollary to the creation of rental space in the parking facility in question for the express purpose [fol. 45] of defraying in large part the financing and operation of such public facility.

Obviously, the Fourteenth Amendment plays no part in purely private acts of discrimination, its force coming into play when a state or one of its agencies or subdivisions fails to deal equally with any person within its jurisdiction.

In deciding whether or not discrimination violative of the Fourteenth Amendment has occurred, Courts make a de-

termination as to whether or not the property involved in the action is in effect publicly owned, and if there is no clear showing of public ownership, whether or not state control is being exercised over a privately owned facility.

Thus, in Eaton v. Board of Managers (C.A. 4), 261 F2nd, the fact that a hospital established pursuant to public law was succeeded by a privately built hospital operated by its own board, thereby removing the hospital from the category of a publicly owned institution,[1] compelled a holding that Negro doctors did not have a constitutional right to insist that they not be barred from hospital staff status solely because of their race or color. Compare Mitchell v. Boys Club (D.C. Dist. of Columbia), 157 F. Supp. 101, and Kerr v. Enoch Pratt Free Library (C.A. 4), 149 F2nd 212. [fol. 46] On the other hand, when a Negro seeks rights in property owned by a state agency or by a state political sub-division, the device of a lease of such property to a concessionaire will not serve to insulate the public authority from the force and effect of the Fourteenth Amendment. Lawrence v. Hancock (D.C.S.D.W.Va.), 76 Supp. 1009, (a public swimming pool), and there would seem to be no valid basis for distinction when the leasing of space by a public authority is not a patent attempt at subterfuge but a good faith method of furnishing service to the public through a tenancy, Derrington v. Plummer (C.A. 5), 240 F2nd 922, cert. denied, 353 U.S. 924, (a restaurant in a county courthouse), and Nash v. Air Terminal Services, Inc., (D.C.E.D.Va.), 85 F. Supp. 545 (a restaurant in a federally owned airport and so subject to the Fifth Amendment).

Conversely, where there are no public moneys or property involved, discrimination may be constitutionally forbidden because of the existence of governmental control over the operation of a privately owned institution or facility, Commonwealth of Pennsylvania v. Board of City Trusts, 350 U.S. 230.

There is no doubt but that the Parking Authority is a tax exempt agency of the State engaged in furnishing

[1] The only public moneys currently received by the hospital were paid by the County for the care of indigent patients.

[fol. 46] public parking service in a facility, the financing of which is being borne in large part by rentals received from tenants occupying other parts of the building, Wilmington Parking Authority v. Ranken (Sup.Ct.Del.) 105 A2nd 614. Because these rentals constitute a substantial and integral part of the means devised to finance a vital public facility, in my opinion it was incumbent on the Authority to negotiate and enter into leases such as the one here involved on terms which would require the tenant to carry out the Authority's constitutional duty not to deny to Delawareans the equal protection of the laws. To say that the Authority has no statutory power to operate the restaurant itself is to beg the question in view of the direct relation of rental income to the financing of the facility.

The lease here provides that the tenant " . . . shall occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority,", and despite the Authority's disclaimer of control over the policies and practices of the Eagle Coffee Shoppe, I am satisfied that the Fourteenth Amendment to the Constitution of the United States is applicable to the operation of all aspects of the structure here involved, and that it forbids discrimi-[fol. 48] natory practices in the restaurant in which plaintiff seeks to establish class rights.

Plaintiff is entitled to a declaratory judgment to such effect. In view of this holding it is unnecessary to consider the common law pertaining to innkeepers or defendants' reliance on §1501 of Title 24,Del.C. as a purported modification of such common law rule.

An appropriate order may be submitted denying defendants' motions and granting plaintiff's motion for a declaratory judgment as prayed for in the complaint.

[fol. 49]

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 1029

WILLIAM H. BURTON, Plaintiff,

vs.

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Defendants.

ORDER OF VICE CHANCELLOR MARVEL—May 11, 1959

It Is Hereby Ordered as follows:

1. That the Motions for Summary Judgment filed, respectively, by the defendant, The Wilmington Parking Authority, and the defendant, Eagle Coffee Shoppe, Inc., are hereby denied.

2. That plaintiff's Motion for Summary Judgment is hereby granted.

3. That the policy, practice, rules, regulations and usage of the defendants, or either of them, denying, by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro, the right and privilege to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the restaurant operated by the defendant Eagle Coffee Shoppe, Inc., in the parking facility owned by defendant Wilmington Parking Authority and situate on the Southerly side of Ninth Street between Orange and Shipley Streets, in Wilmington, Delaware, are hereby declared in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

4. The defendants, their officers, agents, members and employees are hereby permanently enjoined from denying,

by reason of color, race or ancestry, to the plaintiff or any other colored person or Negro the right to use and enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the aforementioned restaurant.

[fol. 50] 5. That the court costs of this action be assessed against the defendant.

6. That the effect of this order be stayed pending the taking of an appeal by defendants upon the filing by them of a supersedeas bond in the amount of $1,000.00 (one thousand dollars).

5-11-59

William Marvel, Vice-Chancellor.

Approved as to Form

Clair J. Killoran, Attorney for Wilmington Parking Authority.

....., Attorney for Eagle Coffee Shoppe, Inc.

Louis L. Redding, Attorney for Plaintiff.

[fol. 50a] [File endorsement omitted]

[fol. 51]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 38, 1959

Appeal From Decree of Court of Chancery of the State of Delaware, in and for New Castle County

CA 1029

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Defendants Below, Appellants,

vs.

WILLIAM H. BURTON, Plaintiff Below, Appellee.

NOTICE OF APPEAL—Filed June 29, 1959

To: Louis L. Redding, Esquire, 923 Market Street, Wilmington, Delaware.

Please take notice that The Wilmington Parking Authority, a body corporate and politic of the State of Delaware, and Eagle Coffee Shoppe, Inc., a corporation of the State of Delaware, Defendants Below, Appellants, hereby appeal to the Supreme Court of the State of Delaware from the Final Order or Decree, dated May 11, 1959, of the Court of Chancery of the State of Delaware in and for New Castle County.

Clair J. Killoran, David Snellenburg, 2nd, Attorneys for Defendants, The Wilmington Parking Authority; Thomas Herlihy, Jr., Attorney for Defendant, Eagle Coffee Shoppe, Inc.

[fol. 51a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 53]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No 38, 1959

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Appellants,

vs.

WILLIAM H. BURTON, Appellee.

OPINION—January 11, 1960

Southerland, C.J., Wolcott and Bramhall, JJ., sitting.

Appeal from the Court of Chancery in and for New Castle County.

Clair John Killoran and David Snellenburg, II, (of Killoran & VanBrunt) of Wilmington, attorneys for appellant, Wilmington Parking Authority.

Thomas Herlihy, Jr., of Wilmington, attorney for appellant, Eagle Coffee Shoppe, Inc.

Louis L. Redding, of Wilmington, attorney for appellee, William H. Burton.

[fol. 54] WOLCOTT, J.:

This action seeks a declaratory judgment that Eagle Coffee Shop, Inc. (hereafter Eagle), the lessee of Wilmington Parking Authority (hereafter the Authority) may not operate its restaurant business in the parking structure at Ninth and Shipley Streets, Wilmington, in a racially-discriminatory manner. The action was commenced by the plaintiff, a Negro, who was denied service by Eagle solely because of his race, color and ancestry, which, plaintiff argues, abridged his rights guaranteed by the Fourteenth Amendment to the Constitution of the United States.

There are no disputed issues of fact. Consequently, all parties below moved for summary judgment. The Vice-Chancellor granted judgment for the plaintiff, holding that the Fourteenth Amendment is applicable to the operation of all aspects of the parking structure, and that it forbids discriminatory practices in the restaurant of the Authority's lessee. The defendants appeal.

The plaintiff's position is that the Authority is performing a public or state function in operating the public parking facility in question and, as an instrumentality of the state, is required to insure that the operation of the public facility shall not be in a racially-segregated manner. Plaintiff further argues that Eagle, as lessee, is the instrumentality of the Authority, admittedly an agency of the state, and that its discriminatory acts are in law the acts of the state and, hence, violative of the Equal Protection Clause [fol. 55] of the Fourteenth Amendment. The court below so ruled.

The Authority's position is that it has not discriminated racially against the plaintiff because it has no legal or *de*

facto control over the operation of Eagle's restaurant. It argues that its sole interest in the Eagle lease is the deriving of rent therefrom in order to defray the expense of operating the parking facility, an otherwise unprofitable operation required, however, to be self-sustaining. Accordingly, the Authority argues that Eagle's refusal to serve the plaintiff was private and not state action subject to the interdict of the Fourteenth Amendment.

Eagle joins in the position taken by the Authority and, in addition, relies on 24 *Del.C.*, §1501 which provides that no restaurant shall by law be obligated to give service to persons if such service would be offensive to the major part of its customers to the injury of its business. This statute, Eagle argues, is a codification of the common law relating to the duties of restaurant keepers.

Since the decision of the Supreme Court of the United States in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, the states and their instrumentalities have been required to act within the scope of state action in a racially non-segregated manner. If, therefore, Eagle is, as plaintiff contends, the ultimate instrumentality of the state performing a state function, the Fourteenth Amendment requires it to serve the plaintiff and all others with his racial background.

[fol. 56] The ultimate question for our determination, therefore, is whether or not, under the decisions cited to us, the Eagle restaurant business is cast with such public character as to make it in law a state function, carried on under the auspices and with the support of the public authority. We turn to the authorities cited to us for the answer.

Nash v. *Air Terminal Services, Inc., et al.*, 85 F.Supp. 545, was a case decided under the now discarded doctrine of separate but equal facilities for Negroes. The case, however, seems pertinent not only because of its factual resemblance to the case at bar but, also, as an enunciation of a test for determining when certain actions may or may not be attributed to the public government.

In the *Nash* case the plaintiff, a Negro using the facilities of the Washington National Airport for air transportation,

sought and was refused service in a restaurant operated in the terminal building. The restaurant in question was operated on a concession from the public government in a building constructed entirely with public money and operated for the serving of persons using an airport constructed entirely with public money. Under these facts it was held that the plaintiff had been denied his rights since, at the time, there were no separate but equal facilities offered for Negro patrons of the airport. *A fortiori*, if the failure to supply separate but equal facilities at a time when that doctrine was part of our constitutional law [fol. 57] was a deprivation of the rights of the plaintiff, once that doctrine is struck down the plaintiff's rights would be denied by the refusal of any service.

Derrington v. *Plummer*, 240 F.2d 922, dealt with the refusal of service to a Negro in a cafeteria installed and operated in the basement of a county courthouse. The facts were that some time in 1953 the county contemplated the erection of a new courthouse. In the plans of the building a portion of the basement was set aside and reserved for a cafeteria to be operated primarily for the benefit of persons having business in the courthouse. The courthouse, including the cafeteria facilities, was completed entirely with public funds. Thereafter, the cafeteria was operated by a private lessee. The cafeteria served persons having business in the courthouse and public employees, and, also, was open to the public. The plaintiff, a Negro, sought service and was refused because of his race.

It was held that the lessee was subject to the prohibitions of the Fourteenth Amendment as the agent of the state. The rationale of the decision is that the courthouse having been built with public funds for the use of the public, the original plans having provided for the inclusion of a cafeteria for the use of the public, and the cafeteria, itself, having been equipped and furnished by the county, the state could not avoid the constitutional requirement of nondiscrimination by leasing to a private business.

[fol. 58] *Culver* v. *City of Warren*, 84 Ohio App. 373, 83 N.E.2d 82, was a case in which the plaintiffs, Negro citizens of Ohio, sought the right to use and enjoy a municipal

swimming pool, built at public expense. It appeared that when completed the swimming pool had first been opened on a non-discriminatory racial basis but that, from that, trouble and disorder had ensued. The city ceased to operate the swimming pool and leased it to a veterans organization at an annual rental of 10% of the gate receipts; the city, however, paying all maintenance costs. The veterans organization, the lessee, operated the pool in a racially-discriminatory manner.

It was held that the lease to the veterans organization was a subterfuge adopted by the city to avoid the requirements of the Fourteenth Amendment. The court was of the opinion that, under the circumstances, the veterans organization was an instrumentality of the city which, in turn, of course, was an instrumentality of the State of Ohio and, thus, was subject to the provisions of the Fourteenth Amendment.

Substantially to the same effect is the case of *Kern* v. *City Com'rs of City of Newton, et al.*, 151 Kan. 565, 100 P.2d 709.

Muir v. *Louisville Park Theatrical Assn.*, 347 U.S. 971, 74 S.Ct. 783, was a case in which the City of Louisville had erected in one of its public parks an amphitheater, owned and maintained by the city. It appeared that the amphitheater was an appropriate adjunct of the city's park maintained for all the people. The city leased the structure [fol. 59] to a theatrical association which, under the terms of its lease, had the right to charge admission fees and to sell refreshments. The plaintiff, a Negro, was denied admittance to a performance in the amphitheater given by the theatrical association.

The District Court held, and was affirmed on appeal to the Court of Appeals, that the city was guilty of no racial discrimination because there was no evidence that any comparable Negro theatrical association had applied to the city for use of the amphitheater. On petition for certiorari to the Supreme Court of the United States the judgment in the *Muir* case was reversed and the case remanded for consideration in the light of *Brown* v. *Board of Education*, supra.

The reason for the reversal is not set forth in full, but it seems apparent that the Supreme Court had in mind the circumstances that the city had built and maintained from public funds an amphitheater for public use and, under the circumstances, any lessee operated it as an instrumentality of the city.

Pennsylvania v. *Directors of City Trusts*, 350 U.S. 230, 77 S.Ct. 1281, was a *per curiam* opinion holding that the trustees under the will of Stephen Girard, appointed by the City of Philadelphia, could not perform their duties under the trust created for the education of "white male orphans" in a manner to discriminate against Negro male orphans. Plaintiff points out that Stephen Girard, by his [fol. 60] will, had created a trust out of his private fortune but that, nevertheless, the principles of the Fourteenth Amendment were held to apply to the operation of the trust by the trustees. The element of public control, apparently, was that the trustees of the Girard Trust were publicly appointed trustees in complete control of the operation of a privately endowed trust.

We think a careful consideration of the foregoing cited authorities leads necessarily to the conclusion that the provisions of the Fourteenth Amendment relating to equal protection of the laws apply to the operation of any facility or any other thing created at public expense or operated by public authority.

In the *Nash* case, for example, the air terminal at the Washington National Airport had been erected solely with public funds and the restaurant involved had been contemplated initially as a service to persons using the National Airport. Furthermore, it is not clear that the public government did not exercise ultimate control over operation of the restaurant since it was operated as a concession of the public government.

Similarly, the *Derrington* case involved a facility constructed entirely with public funds which contained, from the planning stage onward, a cafeteria intended for the use of the public. The cafeteria, itself, was constructed and equipped by public money and was operated primarily for the benefit of the persons using the courthouse. Con-

[fol. 61] sequently, while technically there may have been no direct control over the lessee who operated the cafeteria, the lessee was nevertheless operating a facility erected entirely by the public treasury for the purpose of serving the public.

The *Culver* and *Kern* cases were cases also of publicly paid for facilities. These cases also contain the additional circumstance of an attempt by subterfuge to avoid the prohibitions of the Fourteenth Amendment. The *Muir* case similarly is a case of the erection and maintenance entirely with public funds of an appropriate adjunct of a public park.

The *Girard College* case apparently falls within the scope of the Fourteenth Amendment solely by reason of the fact that the trustees administering the trust created by Stephen Girard were publicly appointed. It is interesting to note that since the *per curiam* decision of the Supreme Court of the United States, the State of Pennsylvania has abrogated the right of the City of Philadelphia to appoint the trustees administering the Girard Trust, thus, presumably, eliminating the requirement that such trust be administered in a racially non-discriminatory manner. Cf. *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, cert. den. 357 U.S. 570.

It thus seems apparent to us from the cited authorities that the Fourteenth Amendment is applicable to the operation of a facility, either public or quasi-public in nature, if either the facility has been erected and is maintained with public money, or if the operation of such a facility [fol. 62] is conducted under public auspices or control.

We turn now to the particular facts of the case at bar. Initially, we should observe that the plaintiff in the case at bar has not been discriminated against by the Authority in the operation of the public parking portion of the facility since the record discloses that at the time this incident occurred the plaintiff had parked his car in the public parking portion and, thereafter, proceeded to the Eagle restaurant where he was denied service.

The facts surrounding this controversy and the physical aspect of the Authority's facility do not appear in much

detail in the record before us. However, we think we are at liberty to take notice of certain physical facts concerning the matter which appear from a casual inspection of the facility itself. We note, therefore, that the space in the Authority's structure leased by Eagle, while located within the exterior walls of the structure, has no marked public entrance leading from the parking portion of the facility into the restaurant proper. The main and marked public entrance to Eagle's restaurant is located on Ninth Street. It appears from the record before us, furthermore, that Eagle at its own expense installed the major portion of the furnishings of its restaurant and all of the necessary fixtures to make the leased space suitable for the operation of its business. The Authority installed a bare minimum in the space ultimately leased to Eagle.

[fol. 63] The lease between the Authority and Eagle contains a covenant binding Eagle to "occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority." Plaintiff refers to this covenant but we think the covenant does not have much bearing on the basic question presented to us. We have for decision the broad question of whether or not the maintenance of the facility by the Authority, admittedly a state instrumentality, is in all its ramifications and details, including the leasing to private business, state action falling within the scope of the protective provisions of the Fourteenth Amendment. The referred to covenant is applicable to this case only if the answer to the broad question is in the affirmative since only under such circumstances would the Fourteenth Amendment be applicable to Eagle's business.

The question is to be decided in the light of the circumstances surrounding this entire matter. The nature of the enterprise conducted by the Authority is of primary importance to our decision. Unfortunately, the record before us is not as complete as we would have desired. We think, however, that we may take notice of the facts embodied in the opinion in *Wilmington Parking Authority* v. *Ranken*, 34 Del. Ch. 439, 105 A.2d 614, on which plaintiff relies. In that case we upheld against attack the constitutionality of the Parking Authority Act of 1951 (22 *Del. C.*, Ch. 5) and

the legality of the proposed acts of the Authority pursuant to it.

[fol. 64] In the *Ranken* case we had before us certain determinations made by the Authority in planning the erection of the facility in question. Thus, the Authority determined that in order to erect and operate the structure as a self-sustaining unit as required by the General Assembly, it would be necessary to obtain additional revenue from commercial leasing of space, and to utilize the space of the final structure upon the following ratio: 61% for parking; 39% for private leases. We assume that the structure as actually completed maintains this ratio. The Authority made a further determination that the cost of construction, including the cost of land, would be divided upon the following ratio: 38.4% to parking space; 61.6% to the leased area. We assume that this estimate of division of cost is the fact. Finally, the Authority determined that its revenue derived from the operation of the facility would come from these sources upon the following ratio: 30.5% from parking; 69.5% from private leases. We assume this division to be the fact.

From the *Ranken* case it appears that the only public money used in the construction of the facility was the sum of $934,000 "advanced" by the City of Wilmington and used in the purchase of a portion of the land required. It did not appear in the *Ranken* case, and does not appear in the case now before us, what the terms and conditions of this "advance" by the city were.

We have not been furnished with the actual cost figures of the construction of the facility but since, in the *Ranken* [fol. 65] case, the cost of construction of a parking facility alone was estimated to be approximately $3,800,000, and since the estimated cost allocated to parking space of a combined facility was 38.4%, we assume that the total cost of the presently existing facility was in the neighborhood of $6,100,000. It does appear as a fact, however, that the actual cost of construction was paid from the proceeds of the sale of revenue bonds issued by the Authority and, accordingly, upon the determined ratios, the public money "advanced" for the project amounts to approximately 15% of the total cost of the facility as finally erected.

From the *Ranken* case, also, it appears that the revenue from parking alone was predicted to be $150,000 annually which was estimated to amount to 30.5% of the total expected revenue of the combined facility. Accordingly, the facility's total revenue we assume to be approximately $342,000 annually, of which approximately $212,000 is derived from the rentals to commercial enterprises.

In the *Ranken* case we considered a constitutional attack upon the Authority's proposal on the basis that it had no authority to enter into private leases solely for the purpose of obtaining revenue to support the operation of the public part of the facility, viz., the furnishing of off-street parking. We held, however, that the authority to lease to private business was valid. We held that the furnishing of off-street parking was a proper public purpose and met an existing need supported by a legislative finding to that effect [fol. 66] and, since it was the fact that the proper public purpose could not be supplied as a self-supporting unit without additional revenue to be supplied by commercial leases, we held that the entering into such private leases did not destroy the public-use character of the facility.

We recognized in the *Ranken* case that the proposed leases to private businesses were wholly unrelated to the public purpose to be subserved by the parking facility, except as a source of additional revenue to permit the financing and operation of the parking facility. We were of the opinion that the supplying of off-street parking services occupying 61% of the total space of the structure, despite the leasing of the balance of the space to private business, was and remained the paramount or primary use of the structure. We held, therefore, that the leasing to private business, while necessary financially to the project, was nevertheless a subordinate or incidental use of public property. We, accordingly, upheld the constitutionality of the grant of power to lease which, in the absence of such circumstances would have been an unconstitutional use of public property.

We summed up our holding in the *Ranken* case in the following language:

> "Since the dominant or underlying purpose of the contemplated project subserves a public use, commer-

cial leasing of space therein for uses unrelated to the public use is permitted to the extent, and only to the extent, that such leasing is necessary and feasible to enable the Authority to finance the project."

[fol. 67] We think it apparent, therefore, that the only connection Eagle has with the public facility operated by the Authority is the furnishing of the sum of $28,700 annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise.

We think the case before us is distinguishable from the cases relied on by the plaintiff. In the first place, it is quite apparent, nor is there any suggestion to the contrary made by the plaintiff, that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility. As far as the record before us indicates, it was immaterial to the Authority what type of business would occupy the space now occupied by Eagle. The Authority's sole interest was in the obtaining of money in the form of rent. That money is thereafter used by the Authority to support the public purpose of supplying off-street parking from which the plaintiff and the rest of the public benefit.

It is further clear from this record, and from the *Ranken* case, that at no time did the Authority contemplate the establishment of a restaurant in the structure for the use of its parking patrons. On the contrary, the commercial leases entered into by the Authority were given to the highest bidders in terms of rent after the solicitation of bids by public advertisement. The decision to lease to a particular lessee was made upon the considerations of the [fol. 68] applicants' financial responsibility and the amount of rent agreed to be paid. It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking.

The plaintiff argues that the use of public money to purchase a portion of the land required brings this case within the rule of the cited authorities. But we think not. At the most, approximately 15% of the total cost is represented by the public "advance" of money. To accept the plaintiff's view would require us in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise. It is obvious that there is no guide for judicial speculation upon such a matter. If it is said that the contribution of any public money is sufficient to change the nature of the enterprise, the answer is that it has been held that a slight contribution is insufficient. Cf. *Eaton* v. *Board of Managers*, 164 F. Supp. 191.

Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; [fol. 69] if it is not the case, the operators of the enterprise are free to discriminate as they will. *Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 842. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We apply the law, whether or not that law follows the current fashion of social philosophy.

Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern

the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the [fol. 70] State of Delaware.

It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to everyone. This is the common law, and the law of Delaware as restated in 24 *Del. C.*, §1501 with respect to restaurant keepers. 10 *Am. Jur., Civil Rights*, §§21, 22; 52 *Am. Jur., Theatres*, §9; *Williams* v. *Howard Johnson's Restaurant*, 268 F.2d 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment.

Finally, plaintiff contends that 24 *Del. C.*, §1501, has no application in the case at bar because Eagle, since it serves alcoholic beverages to its patrons, is a tavern or inn and not a restaurant. It is argued that, at common law, an inn or tavern could deny service to no one asking for it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 *Del. C.*, §1501, which does not compel the operator of a restaurant to give service to all persons seeking such.

For the foregoing reasons, the judgment of the court below is reversed.

[fol. 72]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 38, 1959

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Appellants,

vs.

WILLIAM H. BURTON, Appellee.

PETITION FOR RE-ARGUMENT—Filed January 28, 1960

Plaintiff petitions the Court for re-argument of its decision, on the following grounds:

1. The Court Misconstrued Plaintiff's Position

The Court takes the view (Opinion, p. 16) that plaintiff based argument that his exclusion on the ground of race from the restaurant in the Parking Authority's structure offends the Fourteenth Amendment on the fact that public money was used to purchase part of the site and the Court then concluded that only "approximately 15% of the total cost of the structure is represented by the public 'advance' of money." Construing plaintiff's position thus, the Court rejects it as requiring the Court "in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise."

[fol. 73] However, nowhere has plaintiff taken, nor is his case founded upon, the position the opinion ascribes to him. Instead, briefly summarized, plaintiff's position is the following: that the Parking Authority is an agency of the State; that all of its activity in planning the structure, acquiring the site and erecting and operating the facility is performed as a state, or public, function and through the employment of powers vested in the Authority as a State agency; that all of the funds coming to the Parking Au-

thority, whether advances or donations from the City of Wilmington, proceeds from the sale of revenue bonds, parking fees or rent from tenants, are public funds essential to the creation and maintenance of the structure as a governmental unit; that all physical parts of this unit are property of this State agency, and in the maintenance and operation of the same, the Parking Authority and the restaurateur, who became the Authority's tenant with notice of the public character of the Authority and its structure, are bound by the constitutional inhibitions against racial discrimination.

2. The Court's Opinion Is Founded Upon an Incorrect Assumption of Facts Outside the Record

In concluding that "At the most approximately 15% of the total cost of the structure is represented by the public [fol. 74] 'advance' of money," the Court relied upon an incorrect assumption of facts outside the record of this case, namely, that the cost of construction alone was approximately $3,800,000. (Opinion, p. 13) As shown by "Exhibit A" hereto attached, the cost of construction was $1,288,000.

3. Irreconcilability With Wilmington Parking Authority v. Ranken

In declining to forbid racial discrimination in the governmental structure, the Court's opinion creates an irreconcilable conflict with the rationale of the *Ranken* case in which this Court sustained commercial leasing of "public property" only as incidental to the *public* use; recognized, in sustaining commercial leasing of part of the governmental structure, "that the recent years have seen a very great expansion of governmental activity in fields formerly believed to be reserved for private enterprise," and held "the purpose of the project as a whole to be a public one . . . ."

4. Conflict With Recent Decisions

The Court's opinion conflicts in principle with the only two decisions in this field intervening after submission of this case, rendered just prior to the filing of the opinion,

namely, *Coke* v. *City of Atlanta*, et al., C.A. 6733, U.S. D. Ct., N.D. Ga., Atlanta Division, decided January 6, 1960, and *Jones et al.* v. *Marva Theatres, Inc., and the City of Frederick*, C.A. 10704, U.S. D. Ct., D. Md., decided January 5, 1960, copies of which decisions are appended hereto.

[fol. 75] CERTIFICATE

The foregoing petition for re-argument is believed to be meritorious and presented in good faith and not for delay.

Louis L. Redding, Attorney for Petitioner.

[fol. 77]

EXHIBIT A(1)

(See Opposite)☞

[fol. 79]

(Stamp)

FILED IN CLERK'S OFFICE
JAN 8—1960
C. B. Meadows, Clerk
By R. M. S.
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 6733
Civil Action

H. D. COKE

v.

CITY OF ATLANTA, a Municipal Corporation of the State of Georgia and County of Fulton; WILLIAM B. HARTSFIELD, Mayor of said City of Atlanta; JACK GRAY, Terminal Manager of the Atlanta Airport Terminal; DOBBS HOUSES, INC., a Corporation organized and existing under the laws of the State of Tennessee; B. E. BUTTREY, Manager of Dobbs Houses, Inc., Restaurant at the Atlanta Airport Terminal.

ATTACHMENT TO PETITION FOR REARGUMENT

Plaintiff, a Negro man, a citizen and resident of the State of Alabama and City of Birmingham, on behalf of himself and others similarly situated, brings this complaint seeking injunctive relief. The defendants are the City of Atlanta, its Mayor, its Airport Manager, Dobbs Houses, Inc., and the Manager of the Dobbs Houses, Inc., Atlanta Airport Restaurant.

Briefly, plaintiff alleges that while an interstate passenger from Birmingham, Alabama to Columbus, Ohio, he had to change planes in Atlanta; that his connecting plane was late and that Delta Air Lines issued to him and other passengers Meal Authorization Tickets directed to Dobbs

Houses, Inc. and directed plaintiff and his party to secure their meal at the restaurant of Dobbs Houses, Inc., in the Atlanta Airport Terminal.

Plaintiff contends that he and other passengers entered the Dobbs Houses Restaurant and that plaintiff was refused service at a table of his choice and that the hostess directed him to a single corner table which was segregated behind a screen for the purpose of serving Negroes and refused to serve plaintiff on the same basis as white passengers.

Plaintiff contends that the Dobbs Houses, Inc. restaurant [fol. 80] in the Atlanta Airport Terminal is located on property belonging to the City of Atlanta and that the restaurant is subject to the supervision and control of the city and its agents. Plaintiff contends that the refusal to serve him on the same basis as white passengers was a denial of plaintiff's rights guaranteed by the equal protection clause of the Fourteenth Amendment to the United States Constitution and that the same constitutes a burden on interstate commerce which is forbidden by Article I, Section 8 of the United States Constitution.

Plaintiff seeks an injunction restraining defendants from making any distinction based upon color in regard to services at the Atlanta Airport Terminal or the restaurant therein.

It is the contention of the City of Atlanta, its Mayor and Airport Manager that the space in the Airport Terminal which is occupied by Dobbs Houses, Inc. for its restaurant is leased to Dobbs Houses, Inc. and that the lease does not give the City the right to control the operation of the restaurant and that it has at no time controlled or sought to control the operation of the restaurant.

It is the contention of Dobbs Houses, Inc. that it is a private corporation and that it simply leases the space in which the restaurant is located and that the City of Atlanta does not have the right to control nor has it attempted to control the operation of the restaurant.

Dobbs Houses, Inc. contends that it employed its manager, Mr. Buttrey, and that the segregation, if it amounts to segregation in the dining room, is the result of its manager's own discretion without direction or control from the corporation or from the City of Atlanta and was dictated by his judgment that it was good business to maintain

Contract for Parking Unit Given $1,288,000 Bidder

A long stride toward realization of the multi-level parking building at Ninth and Shipley Streets was taken yesterday afternoon when the Wilmington Parking Authority awarded the construction contract for the facility to McCloskey and Company of Philadelphia.

The contract total, including additional elevator and excavation, stands at $1,288,000.

The McCloskey Company entered the [illegible] bid of $1,243,000 on Oct. 4 during a meeting in the offices of the architect. Five other firms also participated in the bidding, three of them from Wilmington.

With all five members of the authority attending yesterday's meeting, possibly the most important ever held by the parking agency, it was voted to also accept the supplemental bid by McCloskey for a second elevator at $23,000 and the supplemental excavation bid at $22,000.

Under terms of the contract, which will be signed at a later date by officers of the authority and representatives of the construction firm, work on the building will begin after Jan. 1 of next year and not later than Jan. 13.

The initial work will be concentrated on completion of the parking portion of the structure with less immediate emphasis on the [illegible] area.

William [illegible], chairman of the authority, has estimated that the building will be ready for use by the end of September or beginning of October to plenty of time to handle the Christmas shopping through next year.

Work is not getting under way immediately because authority determined some time ago to cooperate with downtown merchants who felt the loss of the parking lot prior to the Christmas season would threaten business.

The additional excavation under the commercial area, which faces Ninth Street, will provide approximately three feet of additional head-room in the basement which will allow tenants to use the area for either storage or sales.

Barney Cantor, vice chairman of the authority, made the motion to accept the McCloskey bid along with the supplemental bids for the elevator and excavation. The motion was seconded by Hubert S. Stees, authority secretary and unanimously approved with, in addition to Mr. Cantor and Mr. Stees, Mr. Feinberg, J. Sellers Bancroft and Jay C. Downs [illegible] voting in assent.

William Sabia represented the successful bidder during the meeting. Clair J. Killoran, authority counsel, was on hand along with G. Morris Whiteside and William Moeckel for the architects, Whiteside, Moeckel and Carbonell, who are handling this phase of the work for the authority. Edwin F. Koester, former authority chairman, also attended the meeting, which was held in the Street and Sewer Department board room in the Public Building.

In other business, the authority members abandoned a proposal to raise the all-day parking rates at the present Ninth and Shipley Streets lot. The decision came after a survey of parking statistics on the lot indicated that only 14.75 per cent of parkers in a four-month period stayed on the lot all day.

The study was based on parking lot activity during November and December of 1958 and March and September of this year. During the period approximately 65,000 automobiles were parked on the lot. The survey also showed 18.5 per cent of the total number of parkers stayed less than one hour, 19.75 per cent [illegible] than two hours and [illegible] per cent stayed [illegible] three hours. The combination of these figures showed that 67 per cent of the total number of cars parked on the lot stayed less than three hours.

On the basis of these figures, the authority members, who sought to increase turn-over and discourage the all-day parker, scrapped the plan.

Mr. Bancroft, authority treasurer, reported that parking receipts at the lot for the month of September were $7,037.70. After operating expenses, wages, and management fees a total of $3,187.47 was deposited to the authority's account, Mr. Bancroft said.

After the reading of a letter,

use the area for either storage or sales

Early plans had included an electric snow removal system for the two circular ramps that will feed automobiles to the parking decks and roof, but the authority scrapped the proposal yesterday on the "recommendation of our architects and the Delaware Power and Light Company." The McCloskey bid for the electric units had been $9,000.

The competing firms and their base bids follow: McCloskey, $1,243,000; Beteo Construction Company, of Philadelphia, $1,281,600; Turner Construction Company of Philadelphia, $1,[illegible]; the Wilmington firms: [illegible] Johnson and Sons, $1,340,000; Healy and Sons, $1,485,000, and the Bader Company, $1,536,000.

The complete proposals have been on display at the Allied Construction Industries offices, 600 block Shipley Street, to allow firms to examine the bids of their competitors for possible [illegible]

circuit sale.

After the reading of a letter from the Emmett S. Heckman Company, local realtors, the authority members agreed to meet in the "near future" with members of the firm to consider terms for leasing the several-store commercial area to be included in the parking structure.

Finally, the authority heard a request from the Retail Merchants Section of the Delaware State Chamber of Commerce for a $474.85 subscription as the agency's share in the cost of arranging for installation of electrical street decorations in the central business district.

A motion was approved to inform the chamber by letter that the authority is without funds for projects of this nature.

Mr. Feinberg directed that the letter inform the chamber that "by this time next year we hope to have tenants in the new Ninth Street stores who will fulfill this obligation."

BIDS ON PARKING PROJECT ASKED

The Wilmington Parking Authority yesterday advertised for bids on construction of its proposed four-level parking building at Ninth and Shipley Streets.

The deadline for bids to be delivered to the office of Whiteside, Moorkel, and Carbonell, architects, is Thursday, Oct. 4. The Parking Authority has said previously that construction should begin in the first two weeks of January.

There will be four levels of varied size for parking including Shipley Street, Orange Street, mezzanine, and roof levels. The three lower levels will start at the back of the commercial section which will face Ninth Street. The entire roof, including the area over the commercial section of the structure, will be used for parking. Total capacity will be 500 cars.

In other business, the authority yesterday decided to send a representative to a parking problem workshop in Detroit, Mich., on Monday and Tuesday, Oct. 22 and 23.

At an afternoon meeting Hobert Steen, a member of the authority, agreed to attend the meeting, which will include discussion of parking in secondary shopping centers, parking problems in mid-city areas, how such problems have been solved in other cities, and summations of the general solutions to the problem.

The Authority also received a monthly report from Ninth Street Parking, Inc., showing net receipts of $3,397.31.

Peninsula Deaths

John-Ed Clifton

LEWES, Sept. 10—(Special)—John-Ed Clifton, 78, a native of Long Neck, Sussex County, died last night at the home of his daughter, Mrs. Lee Rust, on the Millsboro Road.

McCloskey & Co. Figure on Structure $457,000 Under Official Ceiling

Six construction companies entered bids yesterday to erect the Wilmington Parking Authority's multi-level facility at Ninth and Shipley Streets with the three lowest bidders separated by only $37,700.

The McCloskey & Company construction firm of Philadelphia submitted the lowest bid at $1,243,000 with two other companies from that city close behind.

The Baton Construction Corporation, second lowest bidder, trailed the McCloskey estimate by only $18,400 with a total bid of $1,261,400. Third of the Philadelphia companies, the Turner Construction Company, submitted a bid of $1,273,700.

Three Local Firms Bid

Local companies represented included DiSabatino & Sons, John E. Healy & Sons and J. A. Bader Company.

The DiSabatino bid at $1,349,000 was the lowest of the local entries, with Healy next at $1,[illegible],000 and the Bader bid the highest at $1,330,695.

William Feinberg, chairman of the authority, opened the bids in the offices of Whiteside, Moorkel and Carbonell at 909 Tatnall Street, architects for the project, where numerous construction officials, bankers and company representatives had gathered.

Mr. Feinberg announced that copies of the bids would be sent to Allied Construction Industries, 421 Orange Street, where bidders will be allowed to inspect estimates submitted by their competitors. The estimates will remain available to the six firms for a total of five days. Following this legal time period, should there be no discrepancies or disagreements, the authority will be in a position to award the construction contract.

"We are very pleased with the bids," said Mr. Feinberg, "in fact, we are more than pleased."

Extra Funds Available

The [illegible]

Extra Funds Available

The construction ceiling bid for the facility obtained by the authority in April was $1,700,000 and the subsequent bond issue was based on that figure. This means the authority will possibly have some extra money on hand with which to pay off the bonds after construction is completed.

All of the bidders submitted estimates for additional specifications as requested by the authority.

In the order listed, the prices are for an additional elevator.

See PARKING—Page 25, Col. 1

[fol. 81] separate seating for white and Negro patrons and that the failure to maintain separate seating would cause in that restaurant a loss of patronage and decreased revenue.

Findings of Fact

1. Plaintiff, a Negro man, was and is a citizen and resident of the State of Alabama and the City of Birmingham, and is a vice-president and agency officer of the Protective Industrial Insurance Company of Alabama. This company operates and has agents only in the State of Alabama. Plaintiff's business requires some travel and he has occasion to pass through the Atlanta Airport from one to four times a year.

2. On August 4, 1958, plaintiff was enroute from Birmingham, Alabama, to Columbus, Ohio, to attend an insurance convention.

Upon arrival in Atlanta at the airport terminal, plaintiff went to the office of Delta Air Lines to arrange for a change over from Eastern Air Lines to Delta Air Lines. At that time, plaintiff was informed by an agent of Delta that his plane would be late and that he would not be able to get a meal on the plane and the Delta agent gave to plaintiff a meal ticket and directed him to carry the meal ticket to the Dobbs Houses restaurant in the airport terminal for the purpose of being served a meal.

Plaintiff accompanied by two companions entered the Dobbs Houses restaurant and selected a table near the center of the restaurant and as they were about to seat themselves, the hostess approached and told them not to take seats at the table they had chosen, that they would have to be seated at a "table reserved for your people." This table was in one corner of the restaurant and was separated from the other tables by a screen. Plaintiff then asked the hostess why they must sit at the table behind the screen and the hostess replied that she had been "in-
[fol. 82] structed by the management." Plaintiff then asked for the manager and was told that he was not there.

Plaintiff and his companions refused to sit at the table designated by the hostess, whereupon the hostess told them

they could be served at a cafeteria located outside the terminal building, but nearby, which the hostess pointed out to plaintiff and his companions. The hostess informed plaintiff that the same food served in the restaurant would be served in the cafeteria but the prices in the cafeteria would be cheaper. Plaintiff and his companions refused to go to the cafeteria for service there and returned to the office of Delta Air Lines where plaintiff reported to the agent that he had been refused service at the Dobbs Houses restaurant. The Delta agent looked at plaintiff's meal ticket, told him there had been a mistake in that the authorized meal should have been $1.75 rather than $1.50 and made this change on the meal ticket and instructed plaintiff to return to the Dobbs Houses restaurant and assured plaintiff that he could obtain his meal there. Plaintiff and his companions then returned to the Dobbs Houses and were about to enter when the headwaiter met them and advised them not to enter the restaurant unless they were willing to sit at the table reserved for Negroes behind the screen, whereupon plaintiff and his companions did not again enter the Dobbs Houses restaurant.

3. There is constant use of the Atlanta Airport Terminal facilities by Negroes. The Henderson Travel Service, located in the City of Atlanta, has a clientele, the major portion of which are Negroes and in an eleven month period from January 1, 1959 to November 30, 1959, sold airplane tickets amounting to $82,683.85 which figure does not include sales purchased by the use of credit cards. The major portion of these tickets were purchased by Negroes for interstate travel. A spot survey of the Atlanta Municipal Airport between November 20, 1959 and December 1, 1959, [fol. 83] showed the following count of Negro persons that were seen utilizing the facilities of the Atlanta Airport Terminal:

November 20, 1959—1:30 to 4:30 P. M., 19.
November 23, 1959—3:30 to 5:30 P. M., 13.
November 30, 1959—6:30 A.M., to 10:30 A. M., 22.

4. The restaurant of Dobbs Houses, Inc. located in the airport terminal in Atlanta is open to the public generally

and any one who wishes to do so may patronize the restaurant but Mr. Buttrey, as manager of the Dobbs Houses, Inc. restaurant, determined that, for business reasons, segregation of the races would be maintained in the Dobbs Houses restaurant. This policy of segregation was that if the Negroes wanted to eat in the restaurant they would be seated at a table or tables reserved for Negroes which were separated from the other tables in the restaurant by a screen.

5. Dobbs Houses, Inc., nor its manager, at no time received any instructions or directions from the City of Atlanta; Mr. Gray, the manager of the airport; or any one else connected with the city, on the subject of segregation of Negroes within the restaurant. The decision to segregate Negroes from white customers within the restaurant was solely the decision of the management of Dobbs Houses, Inc. It was the opinion of the manager that such segregation was for the best business interest of his company and would actually be for the protection of Negroes in that it might save them embarrassment. The City of Atlanta has nothing to do with this decision and has never undertaken to exercise any control over the restaurant of Dobbs Houses, Inc.

6. The City of Atlanta owns the municipal airport. The City of Atlanta, through a manager and other employees, operates the airport and the terminal building. It leases space in the terminal building from which it received a revenue of $523,599.30 for the year 1958.

[fol. 84] 7. The terms under which Dobbs Houses, Inc. occupies space in the Atlanta Airport Terminal are defined by a lease from the City of Atlanta to Dobbs Houses, Inc., referred to in plaintiff's complaint appearing in evidence as Plaintiff's Exhibits 1 and 2.

The lease describes the space leased to Dobbs Houses, Inc. for the restaurant concession as being " . . . certain space on the first floor of the new passenger terminal building located on the above described municipal airport, marked 'restaurant concession' on 'Exhibit A' attached hereto and made a part hereof."

This lease provides, inter alia, that Dobbs Houses, Inc. shall pay a minimum rental of $1500.00 per month plus 6% of gross sales where such percentage exceeds the sum of $1500.00 per month. The average monthly rentals coming from Dobbs Houses, Inc. to the City of Atlanta from January 1, 1959 to July 1, 1959, was $17,805.60. The lease does not reserve to the city the right to control the operation of the restaurant, nor has the city, in fact, controlled or undertook to control the operation of the restaurant. The lease does provide that Dobbs Houses, Inc. shall render prompt service to the patrons of the airport. The only right to control reserved by the lease contract as to the manner and method of operating any of the concessions leased to Dobbs Houses, Inc. is contained in Article H(2) providing that "Dobbs shall submit to the manager of the airport, if requested, a schedule of articles and commodities proposed to be offered for sale at the tobacco and newsstands and the gift shop, and the prices proposed to be charged therefor and only articles or commodities having the approval of the manager of the airport shall be sold or offered for sale." This provision applies only to the newsstand and gift shop and does not apply to the restaurant. In addition to the space for the restaurant, Dobbs Houses, Inc. also leases space wherein it conducts a snack bar, a [fol. 85] newsstand and a gift shop. The lease imposes various requirements upon the lessee, but nowhere does it give the city the right to control the operation of the restaurant.

The right of the city in the event of default is to cancel the lease.

Conclusions of Law

1. This Court has jurisdiction of this cause by virtue of the provisions of Title 28, U. S. C., § 1343 and Title 42, U. S. C., § 1983.

2. This Court is bound by the decisions of the Supreme Court of the United States and by the decisions of the United States Court of Appeals for the Fifth Circuit.

3. When a provision of the Constitution or a law has been construed or declared by either the Supreme Court of

the United States Court of Appeals for this circuit, this Court is not thereafter free to construe or declare such provisions of the Constitution or law differently even though this Court should believe it should be differently construed or declared, but is bound by the decisions of such courts.

4. The complaint states a proper case for class action. The suit is one for interference with plaintiff's alleged rights as a Negro citizen and he may properly sue on behalf of all other Negro citizens since they all have an identity of interest in having access to the restaurant on a non-segregated basis. Evers v. Dwyer, 358 U. S. 202; Sharp v. Lucky, 5 Cir., 252 F. 2d 910, 913; Derrington v. Plummer, 5 Cir., 240 F. 2d 922.

5. The decisive question presented here is:

Whether the action of the lessee, Dobbs Houses, Inc., may fairly be said to be the conduct of the City of Atlanta and thus state action.

[fol. 86] 6. If this question is answered in the affirmative, it is under the teaching of Ex Parte, Commonwealth of Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, state action inhibited by the first section of the Fourteenth Amendment.

7. If this question is answered in the negative, then the action of Dobbs Houses, Inc. is merely private conduct and however discriminatory or wrongful it may be is not action inhibited by the Fourteenth Amendment. Shelley v. Kraemer, 334 U. S. 1, 13; Williams v. Howard Johnson's Restaurant, 268 F. 2d 845.

8. The defendant, City of Atlanta, contends that the municipality in owning and operating the municipal airport was acting in a proprietary capacity and not in a governmental capacity and that its acts are not state action.

This question has been decided adversely to this defendant's contention by the United States Court of Appeals for the Fifth Circuit in City of St. Petersburg v. Alsup, 238 F. 2d 830.

9. The defendants further contend that the city had executed to Dobbs Houses, Inc. a valid lease to the space in the

Atlanta Airport Terminal where the restaurant is operated with no purpose of discrimination, no joinder in the enterprise or reservation of control by the city, and that the acts of Dobbs Houses, Inc. are not the acts of the City of Atlanta, but is merely private conduct of Dobbs Houses, Inc., a private corporation.

This question has seemingly been decided adversely to the defendants' contentions by the United States Court of Appeals for the Fifth Circuit in the case of Derrington v. Plummer, 240 F. 2d 922, 925(4).

10. It is the contention of the defendants however, that under the facts here, this case comes within the exception recognized in Derrington v. Plummer, supra, wherein the court in that case said:

> [fol. 87] "No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person."

Assuming no purpose of discrimination on the part of the city here and further assuming no joinder in the enterprise and no express reservation of control by the terms of the lease, in order to bring this case within the above quoted exception in Derrington v. Plummer, supra, this Court must find that the leased space was not used or needed for city purposes.

The lease contract itself describes the space leased to Dobbs Houses, Inc. referred to as "restaurant concession" as being " . . . certain space on the first floor of the new terminal building located on the above described municipal airport . . . for the conduct, operation and maintenance of a dining room, kitchen, storeroom, etc. . . . ".

In Derrington v. Plummer, supra, the Court said:

"... the basement of the courthouse can by no means be termed surplus property not used nor needed for County purposes. To the contrary, the courthouse had just been completed, built with public funds for the use of the citizens generally, and this part of the basement had been planned, equipped and furnished by the County for use as a cafeteria. Without more justification than is shown in this case, no court could countenance the diversion of such property to a purely private use.

"Further, the express purpose of the lease was to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. If the County had rendered such a service directly, it could not be argued that discrimination on account of race would not be violative of the Fourteenth Amendment. The same result inevitably follows when the service is rendered through the instrumentality of a lessee; and in rendering such service the lessee stands in the place of the County. His conduct is as much state action as would be the conduct of the County itself."

11. Under the facts in this case the Court holds that the conduct of Dobbs Houses, Inc. is as much state action as [fol. 88] would be similar conduct of the City of Atlanta itself and that the discrimination practiced by Dobbs Houses, Inc. in refusing to serve Negroes except upon a segregated basis is violative of plaintiff's rights as a Negro citizen under the equal protection provision of the Fourteenth Amendment. Plaintiff is entitled to the injunctive relief as prayed.

A judgment in conformity with the findings and conclusions here made may be prepared and presented.

This the 5th day of January, 1960.

BOYD SEGAM
United States District Judge

[fol. 89]

ATTACHMENT TO PETITION FOR REARGUMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil No. 10704

LINWOOD A. JONES, JR., WELDON W. CHRISTOPHER, and DONALD K. LYLES

v.

MARVA THEATRES, INC., and THE CITY OF FREDERICK

Filed: January 5th, 1960

Thomsen, Chief Judge

In this action Negro plaintiffs seek an injunction against segregated seating arrangements or any other kind of discrimination in a theatre, owned by the City of Frederick Md., part of the City Hall building, on city-owned property, but leased to Marva Theatres, Inc. (Marva), a private motion picture theatre operator.

The theatre, known as the City Opera House, was built in 1875 as a place of public assembly. The same entrance serves the City Hall and the Opera House. Since 1927 the Opera House has been leased to private motion picture theatre operators. The term of the current lease, which was made after competitive bidding, is from October 1, 1950 to September 30, 1960. As part of the lease agreement Marva made substantial repairs and improvements.

No state or local law requires or prohibits segregation in theatres, and the lease contains no specific provision with respect thereto. However, the lease includes furniture, equipment and certain facilities which are described in the exhibit attached to the lease as "box office", "colored box [fol. 90] office", "men's toilet", "colored men's toilet", "ladies' toilet", and "colored women's toilet".

The lease provides that the theatre shall be operated not less than six afternoons and nights a week, despite the fact that it is not a percentage lease, and limits the type of shows which may be presented. The City of Frederick reserved the right to use the Opera House or to grant its use to others four days a year. This privilege is generally exercised, and free use of the Opera House has been granted to various social, educational and other organizations.

Marva operates the City Opera House as a motion picture theatre open to the public seven days a week. It does not now maintain a racially segregated box office, but does maintain racially segregated seating and toilet facilities. It reserves the first floor of the main auditorium and the front of the balcony exclusively for white patrons; the back rows of seats in the balcony are set aside exclusively for Negro patrons. The decision as to the seating arrangements was made by Marva's president, carrying out the policy which had prevailed there for some time. He felt it was the only policy he could profitably pursue. A similar policy has been followed for several years by the Tivoli Theatre, the only other theatre operating in the city.[1]

Plaintiffs are Negroes, bacteriologists, residents of Frederick, and are employed at Fort Detrick on the edge of the City.

On or about March 10, 1958, they were refused admission to the first floor of the main auditorium of the Opera House solely because of their race. They were directed by Marva's employees to the section of the balcony which is set aside exclusively for Negro patrons.

If the plaintiffs or any other Negroes were again to pre- [fol. 91] sent themselves for admission to the first floor of the main auditorium of the Opera House, Marva would refuse to admit them to that section for the sole reason that they are Negroes.

The City of Frederick has desegregated all public facilities under its control, but it took the position at the hearing that the existing lease gave it no authority to dictate to

[1] A third theatre is presently closed and is probably unusable [several words illegible].

Marva, one way or the other, what the seating arrangements in the theatre should be.

In view of these facts, at the conclusion of the hearing, I inquired of counsel whether it might be possible to dispose of the case by an agreement of the parties that any lease of the theatre for a term beginning after September 30, 1960, should contain a provision against discrimination, and that in the meantime the plaintiffs would refrain from pressing their claimed rights. The plaintiffs and the N.A.A.C.P., which has been supporting their suit, agreed to such a disposition, if promptly made and supported by an appropriate decree. The Board of Aldermen of the City of Frederick promptly adopted the following resolution, approved by the Mayor: "If the City of Frederick offers the City Opera House for rent after the expiration of the current lease on September 30, 1960, it will include a requirement that the lessee operate said City Opera House without discrimination on the basis of race, color or creed. It is understood, however, that this agreement is not a commitment on the part of the City to lease the said City Opera House after September 30, 1960, if the space is required for governmental or other proper municipal purposes." Counsel for plaintiffs prepared a form of decree, going somewhat beyond the resolution, to which counsel for the City was willing to agree with reasonable modifications, but Marva refused to agree to any injunction even if limited to a possible extension of the existing lease or a holding over after the present term.

During the period occupied by these discussions, Marva, [fol. 92] through a newly-organized and wholly-owned subsidiary, Frederick Theatres, Inc., purchased the Tivoli Theatre and took over the lease of the other (closed) theatre. Marva also assigned to the new corporation its lease of the City Opera House. It has been refurnishing the Tivoli Theatre and intends to operate it and it alone after the beginning of the year 1960. Marva has sought release from its obligations under the existing lease of the Opera House, and has threatened to sue the City of Frederick for damages as a result of the instant case, although its counsel was unable to suggest to the court any possible basis for such a suit. The intransigent attitude of the thea-

tre company and the resulting delays have caused plaintiffs to withdraw their offer to settle, and they now press for a decree in this action. Counsel for the City says that it will stand by the resolution of October 26, 1959, quoted above, but is considering using the Opera House for additional office space or other municipal purposes. Under these circumstances, plaintiffs are entitled to a decree declaring their rights.

In *Department of Conservation & Development* v. *Tate*, (4 Cir.), 231 F.2d 615, the Court said: "It is perfectly clear under recent decisions that citizens have the right to the use of the public parks of the state without discrimination on the ground of race. Dawson v. Mayor and City Council of Baltimore, 4 Cir., 220 F.2d 386, affirmed 350 U.S. 877, 76 S. Ct. 133; Holmes v. City of Atlanta, 350 U.S. 879, 76 S. Ct. 141. And we think it equally clear that this right may not be abridged by the leasing of the parks with ownership retained in the state. See Lawrence v. Hancock, D.C., 76 F. Supp. 1004, 1009; Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971, 74 S. Ct. 783, 98 L. Ed. 1112. And it is no ground for abridging the right that the parks cannot be operated profitably on a nonsegregated basis."

In *Derrington* v. *Plummer*, (5 Cir.), [Illegible] 353 U.S. 924, where discrimination by a [Illegible] cafeteria in a county courthouse was enjoined [fol. 93] [Illegible] doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person."

It is debatable whether this theatre could be considered surplus property, within the exception stated in *Derrington*. But a place of public assembly, a part of the City Hall, leased under an agreement which contemplated segregation, comes within the rule announced in *Tate*. Under the facts in this case, including the terms of the lease and of the exhibit attached thereto, the exclusion of Negroes from the

main floor of the auditorium and the front of the balcony in the City Opera House and the maintenance of racially segregated toilet facilities therein violate the Fourteenth Amendment.

The action of the City has been so fair, in line with its fine traditions, that the court will not enter an injunction against it.

Plaintiffs have asked for an injunction so broad that the City would not be able to allow religious, social or fraternal groups to use the Opera House for a single day for their own purposes if they limit admission to members or other ticket holders. Frederick is not a large city, with the many private facilities available in metropolitan areas. Racial equality can be achieved without an injunction which prohibits any private meeting on public property at any time.

I had originally thought that there were equities in favor of allowing Marva to maintain its present arrangements until the end of the term of its lease, September 30, 1960, so that it might not be handicapped in recovering the investment it had made in repairing and improving the Opera [fol. 94] House during the present lease. But Marva's recent actions have weakened those equities. I will issue an injunction against Marva Theatres, Inc., its subsidiary, Frederick Theatres, Inc., and their respective officers, agents and employees, enjoining further discrimination by them on the property leased from the City.

Rozel Thomsen
Chief Judge, U.S. District Court

[fol. 95]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

[Title omitted]

ORDER DENYING PETITION FOR REARGUMENT—
February 4, 1960

And Now, To-Wit, this fourth day of February, A. D. 1960, the Petition for Reargument filed by the Appellee having been duly considered by the Court,

It Is Ordered that the Petition of the Appellee for Reargument be and it hereby is denied.

By Order of the Supreme Court:

T. E. Townsend Jr., Clerk.

[fol. 96]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MANDATE—February 4, 1960

To the Honorable the Chancellor of the State of Delaware in and for New Castle County:

Greeting:

Whereas, before you or some of you in a cause entitled as follows:

Civil Action No. 1029

WILLIAM H. BURTON, Plaintiff,

v.

THE WILMINGTON PARKING AUTHORITY, ET AL., Defendants

a certain judgment or order was entered on the 11th day of May 1959, to which reference is hereby made; and

Whereas, by appropriate proceedings the said cause was duly appealed to this Court, and after hearing has been finally determined, as appears from the opinion of this Court filed in the cause on January 12 1960, a certified copy of which is attached hereto;

On Consideration Whereof It Is Ordered and Adjudged that the said judgment or order be and it is hereby reversed, with costs, hereby taxed in the sum of Twelve Dollars ($12.00) to be recovered by The Wilmington Parking Authority, et al. against William H. Burton, with right of execution; and the said cause is hereby remanded with instructions to take such further proceedings therein as

may be necessary in conformity with the opinion of this Court.

Witness The Honorable Clarence A. Southerland, our Chief Justice at Dover, the First day of January, A.D. 1960.

Issued February 4, 1960.

T. E. Townsend Jr., Clerk of the Supreme Court.

[fol. 97]

IN THE SUPREME COURT OF THE STATE OF DELAWARE

No. 38, 1959

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware, Appellants,

vs.

WILLIAM H. BURTON, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 28, 1960

I. William H. Burton, the appellant herein, hereby gives notice that he hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Delaware entered in this action on January 11, 1960, petition for re-argument having subsequently been filed by this appellant pursuant to proper practice in said Court and having been denied by said Court on February 3, 1960.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the

Supreme Court of the United States, and include in said transcript the following:

Complaint

Answer of The Wilmington Parking Authority

Answer of Eagle Coffee Shoppe, Inc.

[fol. 98] Motion for Summary Judgment by Defendant Eagle Coffee Shoppe, Inc.

Motion for Summary Judgment by Defendant The Wilmington Parking Authority

Affidavit of Jay C. Pownall

Notice of Motion, Motion to Amend Answer of Eagle Coffee Shoppe, Inc., and Order Thereon

Affidavit of Robert W. Andrews

Affidavit of Earl C. Jackson

Stipulation, Notice of Motion and Motion of Plaintiff for Summary Judgment

Opinion of Vice Chancellor

Order Granting Plaintiff's Motion for Summary Judgment, Enjoining Defendants, and Staying Order

Notice of Appeal

Opinion of Supreme Court of Delaware issued January 11, 1960, reversing Judgment and Order of Vice Chancellor in the Court of Chancery

Judgment of Supreme Court of Delaware Reversing Order and Judgment of Court of Chancery

Petition for Re-argument

Order of Supreme Court denying Petition for Re-argument.

III. The following questions are presented by this appeal:

1. Whether a statute of the State of Delaware, viz., Title 24, Delaware Code of 1953, Section 1501, construed and applied by the Supreme Court of the State of Delaware to authorize and permit the lessee of a restaurant in a structure maintained and operated by a public agency of the State of Delaware to refuse food service to appellant herein, solely on the ground of race, color or ancestry, is repugnant to the Fourteenth Amendment to the Constitution of the United States?

2. Whether a statute of the State of Delaware, viz., Title 24, Delaware Code of 1953, Section 1501, construed and applied by the Supreme Court of the State of Delaware [fol. 99] to authorize and permit discrimination against appellant, solely on the ground of race, color or ancestry, in a structure owned, maintained and operated by a public agency of the State of Delaware, is repugnant to the Fourteenth Amendment to the Constitution of the United States?

3. Whether a structure which originates as the public property of an agency of the State of Delaware and is being used only to effectuate a public purpose of State Government so loses its character as entirely public property when a portion of it is leased to a private lessee that said lessee is unaffected in use of the leased portion by the restraints of the Fourteenth Amendment?

4. Whether the Supreme Court of Delaware, upon the record before it and upon the basis of judicially noticed court record in another case to which appellant herein was not a party, erred in concluding that the appellee, lessee of a restaurant in a structure owned, maintained and operated by an agency of the State of Delaware, was immune from the restraints of the Fourteenth Amendment?

5. Whether a statute of the State of Delaware, viz., Title 24 of the Delaware Code of 1953, Section 1501, which provides that no keeper of a restaurant shall be obliged to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business, and defines "customers" as all who have occasion for enter-

tainment and refreshment, is so vague and indefinite as to offend the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Louis L. Redding, Attorney for William H. Burton, Appellant.

Proof of Service (omitted in printing).

[fol. 99a] [File endorsement omitted]

Acknowledgment of Service (omitted in printing).

[fol. 100] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 101]

SUPREME COURT OF THE UNITED STATES

No. 164—October Term, 1960

WILLIAM H. BURTON, Appellant,

vs.

WILMINGTON PARKING AUTHORITY ET AL.

Appeal from the Supreme Court of the State of Delaware.

ORDER POSTPONING JURISDICTION—October 10, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

October 10, 1960.

